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In the Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 554.

EDWIN F. BROWN, AS RECEIVER OF THE PEOPLE'S NATIONAL BANK OF DENVER, COLORADO, APPELLANT,

vs.

GEORGE C. SCHLEIER AND THE PEOPLE'S NATIONAL BANK OF DENVER, COLORADO, APPELLEES.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF AND ARGUMENT FOR APPELLANT.

This is an equitable action. The appellant receiver and his predecessor commenced and prosecuted this suit against the appellees, Schleier and Bank, under the express direction of the comptroller of the currency. The case involves the right of the comptroller and his receiver to follow and recover the capital and money assets of an insolvent national bank.

I.

THE STATEMENT OF FACTS,

With the insertion, in chronological order, of *important facts alleged*, in *overlooking which* the learned courts below fell into error, is as follows:

The paragraphs ending with specific references to the record are facts overlooked by the court. The other paragraphs are the statements of the opinion. (118 Fed., —.)

1. This case passed off below on a demurrer to the bill of complaint, which was once amended before the demurrer thereto was sustained. (C. C.), 112 Fed., 577.

2. The appellant receiver's motion for leave to file amended bill of complaint after the demurrrer was sustained, was denied. This is also assigned as error. (Motion for leave to file, Record, page 44, folio 64-72; Amended Complaint, Record, page 48, folios 72-129; Order overruling motion to file amended Complaint, Record, page 87, folio 130.)

3. The case made by the bill of complaint, as amended, is as follows:

The People's National Bank of Denver, one of the appellees, was incorporated on July 30, 1889, under the National Bank Act, for the period of 20 years, from July 1, 1889, with a capital stock of $300,000, divided into shares of $100 each.

4. The People's Savings Bank—hereinafter sometimes called "Savings Bank"—was a Colorado corporation, existing July 19, 1889, having a paid-up capital of $50,000 until January 10, 1893, and there-

after of $100,000. (Amended Complaint, Record, page 74, section 31.)

Said Savings Bank had aggregate deposits of savings of tradesmen, mechanics, laborers, servants, minors, and others, on August 1, 1889, when the National Bank commenced business, of about $200,000 (Amended Complaint, Record, page 75, section 33.)

These deposits rapidly increased to about $1,270,000, in April and May, 1893. (Amended Complaint, Record, page 75, folio 109, section 33.)

Long prior to the hereinafter mentioned lease by Schleier to the National Bank, viz., from its opening for business on August 1, 1889, until the 29th of June, 1895, when the Savings Bank made its general assignment hereinafter mentioned, the Savings Bank was a depositor of its said deposits with said defendant National Bank. (Amended Complaint, Record, page 75, folio 109, section 34.)

5. On September 12, 1889, it leased a lot of ground in the city of Denver, having a front on Lawrence street of about 90 feet, from George C. Schleier, one of the appellees, for the term of 99 years, from February 1, 1890, at a yearly rent of $13,975, which rent was to be paid in monthly installments of $1,164.58 during each month of the term.

6. The lessee, the People's National Bank, hereafter sometimes termed the "Bank," covenanted in the lease to erect within 18 months from and after February 1, 1890, at its own cost and expense, a substantial building, not less than four stories in height, to cost not less than $100,000.

7. By the terms of the lease, the lessee was to have no right to remove the building, but the same was to become a part of the realty.

8. By the express terms of the lease, Schleier could not acquire title to the buildings and improvements erected until the possession of the demised premises was surrendered and yielded up at the expiration of the said term or its extension. (Lease, Complaint as Amended, Record, page 7, folio 10; Amended Complaint, Record, page 55, folio 81.)

9. The lease also gave to the lessee and its assigns an option to extend the lease for the same rental for a term of 50 years from and after the expiration of 99 years.

10. The Bank took possession of the demised premises, and on or about the month of January, 1891, had completed the erection of a building thereon, eight stories in height, at a cost of $305,725.39.

11. The National Bank retained possession of the Bank building and premises, reporting the same as an asset at its cost value, about $305,000, until the execution of the deeds of conveyance and surrender of the lease by the National Bank to Schleier, October 30, 1897. (Complaint as Amended, Record, pages 20 to 24, folios 28-33, section 23; also Schleier's Demurrer, Record, page 31, folio 44; also Amended Complaint, Record, page 76, folios 36 to 81, paragraph 43.)

12. On July 19, 1893, the Bank became unable to pay its depositors in due course of business, and the comptroller of the currency appointed J. B. Lazear as receiver thereof, pursuant to the provisions of the national bank act.

13. Said Lazear remained in possession of its assets and affairs until August 21, 1893, when he was discharged; the Bank having, in the meantime, levied an assessment of 20 per cent. upon its shareholders,

and thereby restored its capital so that it was deemed safe for it to resume.

14. That at all the times subsequent to July 19, 1893, the National Bank was and is insolvent. (Complaint as Amended, Record, page 36, folio 52, section 15.)

15. At the date last mentioned the business and affairs of the Bank had become involved somewhat, and commingled with the business of another bank known as the People's Savings Bank, which latter Bank was located and did business in the Bank building that had been erected by the People's National Bank, in which the latter bank also transacted its business.

16. The People's Savings Bank, having become embarrassed, subsequently made an assignment to Fermor J. Spencer, assignee, who thereafter, on June 26, 1897, brought an action against the People's National Bank, in which action he recovered a judgment against it in the sum of $475,825.71 on November 30, 1899.

17. From June 29, 1895, the date of the assignment of the Savings Bank to Spencer, until November, 1896, the National Bank admitted that it was the debtor of the Savings Bank, but thereafter, until the rendition of said judgment, denied all liability. (Complaint as Amended, Record, page 37, folio 54, section 16b.)

The pendency of said action wherein said judgment was rendered was well known to appellee Schleier. (Complaint as Amended, Record, pages 24-5, folio 33, section end of 24; Amended Complaint, Record, page 83, folio 124, end of section 46.)

18. About the month of January, 1897, the People's National Bank commenced to liquidate its affairs with a view of surrendering its charter, and, on April 27, 1897, its stockholders, at a meeting duly held for that purpose, resolved to go into voluntary liquidation.

19. June 26, 1897, the National Bank agreed with assignee Spencer of the Savings Bank with a view to giving "time for better understanding," that if Spencer would refrain from pressing suit until January 1, 1898, it should be without prejudice by reason of such delay, and the Bank would "take no further action for the surrender of its charter or the disposal of its property to the prejudice of plaintiff, assignee Spencer. (Complaint as Amended, Record, pages 38-9, folio 56, section 16d.)

20. On September 20, 1897, the Bank called a meeting of its stockholders to consider a proposition to surrender the remainder of its leasehold term to Schleier, the lessor, stating in its notice to the stockholders that, as the income from the property which it had leased was less than the fixed charge, it had become necessary to take some action to relieve the Bank.

21. The representation in said stockholders' notice, that the income of the Bank building was less than the fixed charges, was false. The rent and income of the property was sufficient to pay the fixed charges and keep the building in good order and repair. (Complaint as Amended, Record, page 19, folio 26, section 21; Amended Complaint, Record, page 69, folios 100-1, section 26.)

22. At that time there was due for rent in arrears under the lease, and for taxes which the lessee

was obliged to pay, a sum amounting, altogether, to about $6,000.

23. Schleier refused to exercise the remedy of public sale given by the lease (Lease, Record, page 9, folio 12), which would have more than paid his indebtedness and left a balance for the payment of debts and liabilities of other creditors of the Bank. He held over the Bank and stockholders the threat of holding them personally liable for the rental for the unexpired portion of the ninety-nine-year term of the lease. (Amended Complaint, Record, page 70, folio 102, section 28.)

24. In compliance with action which appears to have been taken at said stockholders' meeting, the Bank, subsequently, on October 30, 1897, surrendered its leasehold term to the lessor, and the lessor agreed, in consideration of such surrender, to discharge the Bank from its liability.

25. The stockholders, directors and officers of the National Bank utilized and applied the excess value of the $305,000 Bank building above Schleier's demand of $6,000, to discharging themselves and the Bank from liability for future rent for the unexpired balance of the ninety-nine-year term of the lease. (Consideration of deeds from Bank to Schleier; Complaint as Amended, Record, page 21, folio 29; page 23, folio 31; Amended Complaint, Record, page 72, folio 105; page 73, folios 106, 107.)

The honorable comptroller of the currency, upon his own motion, appointed Earl M. Cranston receiver, December 20, 1899. (Complaint as Amended, Record, page 20, section 25.)

26. October 27, 1900, the honorable comptroller of the currency directed the receiver to commence

and prosecute this action. (Complaint as Amended, Record, page 25, folio 34, section 28.)

27. He continued to serve as receiver until May 27, 1901, when he resigned his office, and Edwin F. Brown, the present receiver and appellant, was duly appointed in his place and stead by the comptroller of the currency.

28. In view of the premises, the complainant prayed that the court would decree that the lease executed by Schleier to the Bank on September 12, 1889, was null and void, in view of the national bank act; that the agreement purporting to cancel and surrender said pretended lease was also null and void; that there might be a full accounting between Schleier and the receiver; and that whatever was found due to the receiver upon said accounting be declared a first and prior lien upon the Bank building which the Bank had erected, as well as upon the ground upon which it was situated.

29. The bill was demurred to for want of equity, and the demurrer was sustained, whereupon a decree was entered dismissing the complaint.

30. The argument was heard and the demurrer sustained by Judge Riner, district judge of Wyoming, on December 30, 1901.

Although the receiver's counsel immediately asked leave to file an amended complaint, leave was denied, and final judgment at once entered, dismissing the case, and he at once left Colorado.

Thereafter, at the same term of court, on January 27, 1902, before any change of conditions of parties litigant, the receiver prepared, and moved before him (Riner, J.) on his return to Colorado, for leave

to file an amended bill of complaint. The motion, together with the amended bill, comprises pages 44 to 86 of the record. It was, at the same term, viz., on February 1, 1902, denied, and this is also assigned as error.

II.

ERRORS ASSIGNED.

The ruling at the Circuit Court was made in sustaining the demurrer to the bill of "*complaint as amended.*"

These amendments are found in the record at pages 36-9.

Immediately on the oral announcement sustaining the demurrer, the court entered final judgment, dismissing the bill. The appellant receiver then and there asked leave to amend. Subsequently, at the same term of the court, and before any change in existing conditions, he prepared and tendered his "*amended bill of complaint.*" found at pages 49 to 86 of the record.

The errors assigned in this and the appellate court are:

1. The sustaining of the demurrers of Schleier and the Bank to the "*complaint as amended,*" for want of any equity therein; and,

2. The refusal of permission to appellant receiver to file the "*amended bill of complaint*" tendered.

III.

IF EITHER THE "BILL OF COMPLAINT AS AMENDED" OR "THE AMENDED BILL OF COMPLAINT" STATED ANY FACTS ENTITLING APPELLANT RECEIVER TO ANY KIND OR EQUITABLE RELIEF, THE GENERAL DEMURRER WAS WRONGFULLY SUSTAINED, AND THE MOTION TO FILE THE "AMENDED BILL OF COMPLAINT" WAS IMPROPERLY DENIED.

The Circuit Court gave no reasons for denying the motion. Its opinion was to the effect that the transaction was *ultra vires*, and that nobody but the government of the United States could complain. (Record, page 97.) As the amended complaint did not and could not by any of its allegations alter that conclusion, we may assume that such was the reason that prompted the denial of appellant receiver's motion to file the "amended bill of complaint" tendered.

Therefore, in considering the denial of appellant receiver's motion to file an "amended bill of complaint," the ruling is substantially the same as that of a general demurrer to a "bill of complaint as amended."

The demurrer which was sustained was a *general* demurrer, for want of equity in the bill.

The bill contained a *general* prayer for relief, therefore,

"1. If the bill sets forth facts showing the right to any relief, upon any theory of the bill, the demurrer was erroneously sustained." (Taylor vs. Ins. Co., 9 How., 390, 406; Stevens vs. Gladding, 17

How., 447, 455; Patrick vs. Eisenhart, 20 Fed., 339, 340; Miller, J., in Merriam vs. Holloway Pub. Co., 43 Fed., 450, 457; Blatchford, J., in Perry vs. Littlefield, 17 Blatch., 272; s. c., 19 Fed. Cas., 285, 290; M. T. & D. Co. vs. R. I. Hospital Trust Co., 36 Fed., 863, 866; C. M. & St. P. Ry. Co. vs. Hartshorn, 30 Fed., 241, 243.)

2. No objections to the *form* of the allegations of the complaint is presented. (Christmas vs. Russell, 5 Wall., 290, 303.)

3. The allegations of the complaint must be taken to be true, for the purposes of this demurrer.

> "The question is, whether the facts as stated, if true, constitute a sufficient cause of action. (U. S. vs. Piatt & Salsbury, 157 U. S., 113, 118; Christmas vs. Russell, 5 Wall., 290, 303; Simmons vs. Saul, 138 U. S., 439, 457.)

4. The demurrer not only admits all the material facts well pleaded, but also all the necessary intendments and inferences of and from such facts.

> "Necessary circumstances implied by law need not be expressed." (Sullivan vs. Iron Silver Min. Co., 109 U. S., 550, 555; Supply Ditch Co. vs. Elliott, 10 Colo., 327, 332.)

IV.

THE TWO QUESTIONS PRESENTED ARE:

I. Can the People's National Bank, while insolvent, and in course of voluntary liquidation, as against appellant receiver, who represents then existing creditors (the People's Savings Bank and its depositors), lawfully convey away its Bank building, representing the then form of its $305,000

capital and moneys, to creditor landlord Schleier, upon the considerations of,

The satisfaction of

(1) About three months' back rent, due landlord Schleier, amounting to $6,000; and

(2) All future accruing rent for over ninety-one (91) years more, and

(3) The release of the stockholders and Bank from liability on personal covenants of the lease therefor,

And leave unsatisfied the judgment of such creditors, represented by such receiver, for $475,825.71, although such indebtedness (a) was owing by the Bank long before Schleier's rent accrued, and (b) was in suit long before Schleier acquired either any title to, or possession of, the Bank building?

II. Schleier's title to the Bank's capital—the building—being executory (through the National Bank's continuous possession of the building until its aforesaid surrender and reconveyance, on October 30, 1897), can the appellant receiver, under above circumstances, representing creditors of the National Bank ever since July 19, 1893 (allegations of "complaint as amended")—in fact, ever since National Bank's organization, August 1, 1889, and before the lease was made (allegations "amended bill of complaint")—have a cancellation and rescission of the lease covenants, whereunder Schleier claims title to such building, the then form of the Bank's $305,000 capital and assets?

The General Theory of the Action Is—

a. That the capital and moneys of the People's National Bank was by its charter contract with the Savings Bank and its depositors impressed with the

public duty to be at all times kept out of real estate, and in the general form of currency, and used in the conduct of the solvent business of a national bank, according to the act of Congress, "the national bank act," so as to repay the Savings Bank and its depositors the full amount of their deposit debts, on demand, in the due course of business.

b. That the transaction between Schleier and the National Bank, when it had only been in business one month and eleven days, whereby it put its $305,000 (more than its entire share capital) into an eight-story office building, of which it and the Savings Bank only occupied one-half of one floor, was a disabling and abandonment, by the National Bank, from the performance of such public duties, as a quasi-public corporation, in violation of its charter contract with the government and the Savings Bank and its depositors, to at all times maintain a solvent, going national bank, so as to repay them their debts, entitling this appellant receiver, as their representative, to follow and recover such capital and moneys, now in the form of the building, from Schleier, in order to pay the $475,825.71 judgment due the Savings Bank and its depositors.

c. The principles applied in the following cases are, among others, relied on as sustaining the action:

> "The individual partners in a private bank were also directors in a national bank, and by reason of their position became possessed of a large part of the means of the national bank, which they used in their own business. They assigned all their property to trustees for the benefit of their creditors. The national bank also suspended and went into the hands of a receiver;

Held, that the receiver was entitled to the surrender of as much of the property as had been actually purchased with the moneys of the bank, as he might elect. (Syllabus, page 671.)

"Formerly, the equitable right of following misapplied money or other property into the hands of the parties receiving it, depended upon the ability to identify it; the equity attaching only to the very property misapplied. This right was first extended to the proceeds of the property, viz., to that which was procured in place of it by exchange, purchase or sale. * * * Finally, however, it has been held as the better doctrine, that *confusion does not destroy the equity* entirely, but *converts it into a charge upon the entire mass*, giving the *party injured* by the unlawful diversion *a priority* of right over the other creditors of the possessor." (Opinion, page 693.)

Peters vs. Bain, 133 U. S., 670, 671, 693.

"A *receiver* of a national bank *may maintain a bill* in equity to discharge sureties on a bond given to dissolve an illegal attachment against the bank, *and recover* from the possession of such sureties, *assets of the bank deposited with them* to indemnify them against loss on such bond."

Pacific Natl. Bank vs. Mixter, 124 U. S., 721, 729.

"When a *loss has been caused by the appropriation of the funds of a corporation to a purpose unauthorized by its charter*, or by culpable negligence, or by a conversion of its funds, all those who are chargeable with the fault which has occasioned the loss, are liable for the entire misappropriation, without regard to the degree of dereliction of which each is guilty.

"A bill by the receiver of a national bank against its officers and directors, for the unlawful diversion of funds of the bank, is sufficient to support a recovery, when the diversion is proved. The gravamen of the bill is the fact of unlawful diversion.

"A *national bank has no power to prosecute a mining business* on property which it has acquired, much less to expend its funds in prospecting for mineral on such property."

Cooper vs. Hill, Receiver, 94 Fed., 582.

"Whenever the legal title to property is obtained through means, or under circumstances, which render it unconscionable for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never, perhaps, have had any legal estate therein; and *a court of equity* has jurisdiction to *reach the property* either *in the hands of the original* wrongdoer, *or in the hands of any subsequent* holder, *until a purchaser of it in good faith and without notice* acquires a higher right and takes the property relieved from the trust."

Moore vs. Crawford, 130 U. S., 122, 128.

V.

THE APPELLATE COURT WHOLLY MISAPPREHENDED THE ACTION.

IT CONSIDERED THE ISSUE TO BE WHETHER SCHLEIER'S LEASE WAS VOID SO IT VESTED NO ESTATE IN THE BANK,

WHEREAS THE ISSUE WAS WHETHER THE LEASE AND ITS SURRENDER WAS VALID TO BIND THE BANK'S CREDITORS AND RECEIVER TO LOSE TO SCHLEIER ITS BUILDING, INTO WHICH FORM IT PUT ITS $305,000.00 CAPITAL AND CASH, UNDER ITS COVENANTS IN SUCH LEASE.

The learned appellate court said:

> "The theory of the bill was that the lease was void. The *lessor Schleier* is, therefore, *liable*, as joint tort feasor, *for* all *damages* which the *creditors* of the Bank have sustained *in consequence of the execution* (signing and delivery) of the lease (on September 12, 1899) without lawful authority." (Record, 106, lines 1-10; also 109, lines 3-6.)

This is incorrect. Such an action "for damages" would be *at law*, and *not* in *equity*. Judgment would be asked against Schleier for some certain amount, instead of, as here, for an accounting, but not for past payments of rent under the lease.

The view of the opinion is:

a. Schleier's lease (*not* as a building lease) "*vested an estate*" in the Bank;

b. That the vesting of such estate—the whole 99-year term—was *fully "executed"* at the signing and delivery of the lease, September 12, 1889.

c. That "the act complained of (converting $305,000.00 capital and money into Bank building) was not *malum in se*, but, at most, was simply *ultra vires*. (Record, page 109, lines 32-4).

d. Therefore, the Bank's receiver and creditors can not, but only the government can complain of this *ultra vires* transaction, whereby the Bank (in changing the form of its assets) gained (?) an estate—the leasehold.

We respectfully submit that this view of the learned appellate court not only limits, but completely reverses the theory of the bill, in a manner totally inconsistent with the admitted allegations.

That only the government may complain of an executed, *ultra vires* conveyance of real estate to a corporation is conceded. The corporation and its creditors have *gained* something, and are presumed not to be harmed, but to be benefited.

The vital difference between the view of the opinion and the allegations of the bill lies in this: The bill deals with a *loss*, the opinion with a *gain*. The bill concerns a loss of assets which the Bank always had, first in cash, $305,000.00, and then in the

building; while the opinion concerns the gaining of a chattel real, the vesting of the term of the 99-year lease.

The bill presents a case involving the Bank's end of the transaction concerning its title, and its obligations touching its own admitted assets, its $305,000.00 capital and moneys, that it put into the building—rather than its acquisition of title to an estate, by the lease from Schleier.

The opinion recognizes these two different phases. While it declares that the lease as a conveyance vested an estate—the full 99-year term—in the Bank, on the execution of the lease (Record, page 111, lines 3-6), yet it also holds that its *personal* covenant to pay the rental for 99 years did not bind the Bank any longer than it had actual possession. (Record, page 108, lines 26-38.)

By section 5234, the receiver is authorized to collect and recover "*assets of every description*," and "all claims belonging to" the insolvent National Bank.

The controversy is not whether the lease made by Schleier to the Bank passed any estate to the Bank for all or any part of the 99 years.

The transaction complained of is not the act of the Bank in converting its capital and moneys—$305,000—into the form of the Bank building, completed in January, 1891.

On the contrary, the transaction complained of is the loss of the moneys and assets of the Bank—in the form of the Bank building—to which Schleier claims title, through the conveyances and surrender, on October 30, 1897, under the terms of his lease to the Bank.

The opinion says:

> "After the investment is made and the conveyance to the Bank (the lease) has been executed and delivered, it operates *to vest in the Bank* such an estate as the conveyance, by its terms, creates." (Record, 111, lines 3-6.)

While denying the sufficiency of the lease to lawfully bind either the Bank or its title to its $305,000 capital assets, we say, very well, then! Since in the completed building in the actual possession of the Bank, it still had an asset, the then depositors, now judgment creditors of this Bank, represented by this appellant receiver, want to know why Schleier, who is not an innocent purchaser for value without notice, should not be held liable to account for this asset, the building?

The learned court below fell into error by ignoring the following important facts:

1. The action was to follow and recover $305,000, capital and moneys of the Bank, put by it into the form of the Bank building, under its covenants in the lease.

2. That the *National Bank retained* the *actual possession* of its $305,000, capital and moneys, *and* thereafter the *building*, until October 30, 1897, thereby making *Schleier's claim* under any of the covenants of the lease *executory*, and,

3. That Schleier was not an innocent purchaser of the building for value, without notice.

VI.

SCHLEIER WAS NOT AN INNOCENT PURCHASER, FOR VALUE, WITHOUT NOTICE.

THE TRANSACTION COMPLAINED OF IS:

The Bank's loss of its assets, the $305,000 building, to creditor landlord Schleier, on October 30, 1897,

WHEN SUCH NATIONAL BANK

(a) WAS INSOLVENT,

(b) WAS IN COURSE OF VOLUNTARY LIQUIDATION, AND

(c) WHILE SPENCER'S SUIT AS ASSIGNEE OF PEOPLE'S SAVINGS BANK,

(1) Then pending since June 26, 1897,

(2) Upon the Bank's debtor relation, existing ever since National Bank's organization, August 1, 1889,

(3) Resulted in a $475,825.71 judgment against the National Bank, on November 20, 1899, and

(d) WHEN SCHLEIER HAD FULL KNOWLEDGE OF SUCH PENDING SUIT,

(e) TOOK HIS TITLE AND POSSESSION OF SUCH BUILDING IN VIOLATION OF THE AGREEMENT BETWEEN THE BANK AND SPENCER, THAT THE BANK'S ASSETS SHOULD NOT BE DISPOSED OF, AND

(f) **UPON THE UNLAWFUL CONSIDERATIONS OF**

(1) Preferring Schleier's debt for past and future rent for ninety-one (91) years ($1,275,000), the balance of ninety-nine-year term, and

(2) The discharge of Bank's shareholders upon Bank's personal covenant for such future rent.

(3) And,—following the opinion that the Bank's personal covenant was not a liability to pay to Schleier future accruing rent, then,—

(g) **UPON THE GROSSLY INADEQUATE CONSIDERATION OF A $305,000 BUILDING TO PAY ONLY A $6,000 DEBT,**

A DISPARITY IN CONSIDERATION ITSELF SUFFICIENT TO RAISE A PRESUMPTION OF FRAUD, BETWEEN SCHLEIER AND THE BANK, CALLING FOR EXPLANATION.

Schleier was not an innocent purchaser.

Schleier's general demurrer admits the following to be the facts:

1. That *Schleier made the lease*, containing the Bank's covenants calling for, and under which it made, the wrongful expenditure of its $305,000, capital and moneys, in the building.

The opinion, while not expressly so stating, conveys the impression that Schleier was an innocent party.

It says appellant "receiver is not authorized to challenge or impeach an executed transaction between the Bank and a *third party,* etc." (Record, bottom page 109, lines 48-50.)

Also, that "we fail to see any ground upon which Schleier can be held accountable to the creditors of the Bank or to the United States, because the Bank saw fit to erect a more expensive building than it had engaged to build." (Record, page 109, lines 9-11.)

The opinion wrongfully states the covenant of the Bank as being "expend *as much as* $100,000." (Record, page 109, line 5.)

The *Bank's covenant was* to use its moneys in constructing the "building *not less than* four stories in height, to *cost not less than* $100,000." (Record, page 7, folio 9.)

The phrase, "not less than," is *a minimum*, and *not* a maximum, limitation in the Bank's covenant.

Any *expenditure in excess* of the $100,000 is *as much within* the covenant *as the actual* sum of $100,000.

By this *phrase, "not less than," Schleier gave* his *consent to the construction of the more expensive* building, *just as much as he* thereby *withheld* his *consent to* the construction of a *less* expensive one, and showed that such an one would not be within the Bank's covenant.

The covenant for the construction of the building is an act essentially entire in its nature. The building is an entire thing. If any part of the covenant, act or structure was unlawful, then, by the principle applicable to entire considerations, the whole must be unlawful. (Hedges vs. Dixon County, 150 U. S., 182.)

Courts do not apportion the responsibility between wrongdoers, whether the acts are advisory only (Cooley on Torts, 2d Ed., 155-6*, 134-5), "or separate and independent acts." (States vs. Mosereau, 64 N. Y., 138.)

> "If a person accept property, he adopts the means by which it was procured, or, as Lord Chief Justice Wilmot said, 'Let the man receiving a gift be ever so chaste, yet, if it comes through a polputed channel, the obligation of restitution will follow it.'" (1 Perry on Trusts (5th Ed.), section 211; Moore vs. Crawford, 130 U. S., 122, 128.)

Schleier must elect to either treat the whole performance and building as within the terms of the covenants he exacted, and accept the inseparable burdens, or reject the whole of it, as not within the Bank's covenants.

To the opinion's suggestion, that Schleier was helpless after the lease was signed, we reply that he could have cleared himself by notifying the Bank that he would not be responsible for the consequences which might flow from any expenditure over the $100,000. This he never did.

So far he has always claimed the entire $305,000.00 *eight*-story building, under the lease and the Bank's conveyance to him of October 30, 1897, as his property. He can not blow hot and cold.

He therefore occupies the legal status of insisting that the building, as built, was constructed in compliance with the Bank's covenants. He must, therefore, accept the burdens of that position.

In any event, Schleier's liability does not in any respect measure the corporate powers of the Bank. Unless, as will be shown, he be an innocent purchaser, for value without notice, he can not keep the $305,000.00 capital of the Bank—the building.

2. Schleier's demurrer admits that he took a conveyance from the Bank of its building, on October 30, 1897, when he took a surrender of the lease, well knowing,

a. That the suit of assignee Spencer, to recover hundreds of thousands of dollars, due from the National Bank to the Savings Bank and its depositors, due ever since the Bank's failure in 1893, and *prior* thereto, had been pending since June 26, 1897.

This suit resulted, November 20, 1899, in judgment against the National Bank for $475,825.71. (Record, pages 24-5, folio 33, and section 24; Record, page 83, folio 124, and section 46.)

The Bank's conveyance of the building, pending the suit against it by Spencer for such a large amount, was a fraud. (Venable vs. Bank, 2 Peters, 107, 112; Trust Company vs. Sedgewick, 97 U. S., 304, 307.)

b. Schleier's knowledge of this suit put upon him the burden of inquiry, and charged him with notice of what he might have ascertained by the exercise of reasonable diligence. (McClure vs. Twp. of Oxford, 94 U. S., 429, 432; The Kate, 164 U. S., 458, 465-66; The Valentia, 165 U. S., 267; Woolsensak vs. Reiher, 115 U. S., 96, 99; Ives vs. Sargent, 119 U. S., 652, 661; Angle vs. N. W. M. L. Ins. Co., 92 U. S., 330, 342.)

> "It is a rule of universal application in all cases of fraud on the part of the debtor, or seller

> of property, that notice of facts sufficient to put a party upon inquiry, amounts, in judgment of law, to notice, and is sufficient to charge the purchaser with knowledge of the matters and things it is reasonable to suppose such inquiry or investigation would have developed. *Inquiry on the part of the purchaser* having such notice becomes a *duty*, and *diligence an act of justice.*"
>
> Hamlin vs. Pettibone, 6 Biss., 167; s. c., 11 Fed Cas. No. 5995, pages 373, 375.

Schleier, therefore, must be presumed to have known:

(1) That the National Bank had been the depository and debtor of the Savings Bank and its small savings depositors ever since the National Bank commenced business—August 1, 1889—and long prior to the execution of his lease.

(2) That ever since the closing of the National Bank, July 19, 1893, until about November, 1896, the National Bank admitted it was the debtor of the Savings Bank and its depositors, and that only because of its repudiation of this liability did it become necessary for assignee Spencer to bring suit. (Record, page 37, folio 54, section "16b.")

(3) That July 2, 1897, the National Bank agreed with assignee Spencer that if he would "refrain from taking any further steps in said suit until January 1, 1898, without prejudice by reason of such delay," the National Bank agreed that it would "take no further action whatsoever to the prejudice of" assignee Spencer "in the above named suit, or any further action whatsoever for the surrender of its charter or the disposal of its property to the prejudice

of" said plaintiff assignee Spencer. (Record, pages 38-9, folio 56.)

Therefore, Schleier, by his transaction of October 30, 1897, in seeking to acquire title to the National Bank's assets, the Bank building, in face of the contract aforesaid between assignee Spencer and the National Bank, that the Bank would not then dispose of its property—the building—makes him, Schleier, a *lis pendens*, and therefore a *mala fide* purchaser. (Owens vs. Meyers, 3 Bibb, 278; Kellar vs. Stanley, 86 Ky., 240; s. c., 5 S. W., 477, 480.)

(4) Schleier, from his knowledge of the suit, must also be presumed to have known that the National Bank had been for some time prior to said July 1, 1897, in course of voluntary liquidation.

> "After a vote of the directors to close their bank and go into liquidation, any transfer of the assets of the bank to a creditor, whereby that creditor secures a preference, will be presumed to be made with a fraudulent intent."
>
> Bank vs. Price, 22 Fed., 697.

(5) Schleier's demurrer also admitted that the Bank was, and had been, insolvent for years.

It is fair to assume that the Bank made itself insolvent by putting its entire capital into the Bank building.

Ever since the Bank closed, July 19, 1893, it was insolvent through its inability to discharge its debts in the due course of business. (Irons vs. Bank, 6 Biss., 306.)

The Bank's failure to pay Schleier his rent under the lease, for the three months prior to October 30,

1897, was of itself sufficient notice to Schleier of the Bank's insolvency.

Section 5242 of the United States Revised Statutes makes void all transfers by a national bank after an "act of insolvency," or in contemplation thereof.

> "It is sufficient, under section 5242 of the Revised Statutes, to invalidate such a transfer, that it is made in contemplation of insolvency, and either with a view to prevent the application of the assets of the bank in the manner prescribed by chapter IV of title 62 of the Revised Statutes, or with a view to the preference of one creditor to another."
>
> U. S. Bank vs. Butler, 129 U. S., 223, 231.

It seems that it is immaterial whether Schleier actually knew of the Bank's insolvency.

> "It is not necessary, in order to invalidate a transfer, that the party to whom it is made knows of or contemplates the insolvency of the bank which makes the transfer."
>
> Case vs. Citizens' Bank, 2 Woods, 23.
>
> Roberts, Recvr., vs. Hill, Admr., 24 Fed., 571, 574.

Schleier was bound to know that, either because of, or, in contemplation of insolvency, the National Bank was, by law, required to make a just and equal distribution of its assets among all unsecured creditors, and that preferences were prohibited and unlawful. (Davis vs. Bank, 161 U. S., 275, 284; Scott vs. Armstrong, 146 U. S., 499, 510; Bank vs. Price, 22 Fed., 697; U. S. R. S., section 5242.)

> "A statute like section 5242, to secure to the bank's creditors an equal distribution of its assets, partakes of the character of a bankrupt law. Any act done with a view of defeating this object is a fraud upon the act, and is illegal."
>
> Hahn vs. Salmon, 22 Fed., 801, 810-11; s. c., 10 Sawyer, C. Ct., 198.

Sections 5242, 5236, and other provisions of the national banking act, are a part of the substantive charter contract which enters into every contract between the national bank and its creditors. The act furnishes a cumulative statutory remedy for all creditors. (Wright vs. National Bank, 1 Flip. C. Ct., 568; s. c., 30 Fed. Cas., 679, case No. 18,084; Irons vs. National Bank, 6 Biss., 301; s. c., 13 Fed. Cas., 100, case No. 7,068; s. c., 120 U. S., 27.)

So far as Schleier's dealings were in violation of the Bank's charter contract, preventing preferences and preserving equality among its unsecured creditors, he can not claim to be an innocent purchaser. (Baily vs. Citizens' Gas Light Co., 27 N. J. Eq., 196.)

3. Schleier's demurrer admits that he coerced the Bank to convey him the building and surrender the lease by threats of holding the Bank and its stockholders liable upon the *personal* covenant of the Bank to pay the rent for the ninety-one remaining years of the lease.

Schleier's deeds from the Bank state one of the considerations to be such release from liability from all future rent.

4. Schleier's demurrer admits that the statement made at the time of the stockholders' meeting, likewise contained in the notice thereof, that the fixed

charges exceeded the income of the building, was a false statement.

5. If the opinion of the learned appellate court be accepted as correct, on the point that the *personal* covenant of the Bank to pay rent imposed no future liability after the Bank ceased to occupy the premises —then Schleier not only received (a) full payment of his rent during the years the Bank was insolvent (1893-7), excepting only the last three months—and (b) took a $305,000 building to satisfy less than a $6,000 debt.

> "Giving a preferred creditor more than debt is reasonably worth is fraudulent." (Klein vs. Hoffheimer, 132 U. S., 367, 378.)
>
> "If the inadequacy of price is so gross as to shock the conscience, or if, in addition to gross inadequacy, the purchaser has been guilty of any unfairness, or has taken any undue advantage, or if the owner of the property or the party interested in it has been for any other reason misled or surprised, then the sale will be regarded as fraudulent and void, or the party injured will be permitted to redeem the property sold.
>
> "Great inadequacy requires only slight circumstances of unfairness in the conduct of the party benefited by the sale, to raise the presumption of fraud."
>
> Graffam vs. Burgess, 117 U. S., 180, 192.
>
> Schroeder vs. Young, 161 U. S., 334, 378.
>
> Byers vs. Singer, 19 How., 303, 311.

"To require a rescission, the consideration must be grossly inadequate. * * * The consideration must be *so inadequate* as to strike the mind *at first blush* as far below the actual value

of the property, and to clearly *indicate* the existence of *some unfair* dealing, some *fraud, imposition* or *oppression* by the purchaser."

Jenkins, Assignee, vs. Ernstein, 3 Biss., 128, 136-7.

Osgood vs. Franklin, 3 Johnson's Ch., 323.

"A conveyance of land worth $2,000, in consideration of a payment of $100, is constructively fraudulent against creditors."

Scoggin vs. Schloath, 15 Oregon, 380.

"A transfer by a debtor in failing circumstances, even for a valuable consideration, if it lacks the element of good faith, is fraudulent and void as against creditors."

Lukins vs. Aird, 6 Wall., 78, 79.

In this case there were the following elements of fraud:

(a) The stockholders of the Bank relieved themselves from further liability on the *"personal"* covenant of the Bank for rent for the balance of the term. The shareholders' liability was an asset. The Bank's capital—$305,000.00, the building—was an asset. By this shifty transaction, two assets were wiped out at one fell swoop.

(b) Schleier threatened to hold the stockholders liable for this rent, unless they accepted to his proposition.

"Deeds of land made by *grantor* when *deeply in debt* and when *suits* were *pending* against him,

and the *consideration* money one-*half* only of the *actual value*, are a fraud."

Hudgins vs. Kemp, 20 How., 45, 52-3.

"A sale by a debtor to a creditor of property of *value* largely in *excess of* the *debt* due from one to the other, is prima facie fraudulent, when *made under an impending seizure* of the same property by another creditor."

Worrell vs. Vickers, 30 La. An., No. 1, 202.

See cases in 10 A. and E. Enc. L., 331, paragraph IV, n. 2.

(c) The suit of assignee Spencer for a large amount (over $1,000,000), in which the judgment of $475,800 was pending.

(d) The Bank had agreed, when the suit was commenced, that it would take no steps to dispose of its property, pending the disposition of Spencer's suit, and Schleier knew of the pendency of this suit, and also of the Bank's agreement not to dispose of the building.

(e) It was averred that the income from the Bank building was making it a losing proposition. when, as a matter of fact, it was not a losing proposition.

(f) Schleier had been getting his rent all the time since the insolvency of the Bank in 1893, at the rate of $13,000 a year, while the Bank, first admitting, and then subsequently contesting, the indebtedness to assignee Spencer, the Savings Bank and its 5,000 small depositors.

The circumstances are certainly sufficient to show that Schleier was anything but an innocent pur-

chaser for value without notice. The taking of the Bank's $305,000 capital—the building—in satisfaction of less than a $6,000 debt, leaving the small depositors of the Savings Bank with their $475,000 judgment unsatisfied, is certainly such a gross disparity between consideration and value, and is done under such circumstances, as to shock the moral sense and provoke the righteous indignation of any court of equity.

In the present state of the pleadings, the burden is on Schleier to make the defense of innocent purchaser.

> In the first instance, "the burden is upon the attacking creditor, but where the fraudulent intent on the grantor's part is made out, and the circumstances are suspicious, the purchaser must show that he has paid value, and if he does, it must then appear that the purchaser had notice of the fraud."
>
> Crawford vs. Neal, 144 U. S., 585, 595.

"In the testimony of Klein himself, it was made very clear that he was aware, at the time of the transaction by which he obtained their choses in action, that Strauss and Levy were insolvent, or, at least, in failing circumstances, and unable to pay their debts; and that he received from them all, or nearly all, of the notes and accounts due them, and professed to take them in payment of the debt of his firm.

"It was not unreasonable, therefore, that the court should charge that, under these circumstances, Klein and his partners should establish the fairness of the proceeding by which they came into possession of these notes and accounts. * * * The insolvency of Strauss & Levy were

known, or at least might have been known, to Klein, and, therefore, when he undertook to deal with the assets of this insolvent firm by taking a very large part of them in payment of his own debt, a circumstance which he knew must leave a large number of other creditors unprotected, or without means for payment, it was proper that all his dealings in that matter should be fair and honest; that his claim should be a just one, and that he should receive no more than what was reasonably necessary to pay his debt; and that if the transaction was tainted with any fraud or unjust interference with the rights of creditors, it should not stand."

Klein vs. Hoffheimer, 132 U. S., 367, 377-8.

First National Bank vs. Swan, ...Wyo., ——; s. c., 23 Pac., 743, 750-1.

"But to avoid the settlement, insolvency need not be shown nor presumed."

Parish vs. Murphree, 13 How., 92, 100.

Weeks vs. Hill, 88 Me., 113; s. c., 33 Atl., 778.

Pratt vs. Curtis, 2 Lowell, C. Ct., 87; s. c., 19 Fed. Cas., 1,251, Case No. 11,375.

Sedgwick vs. Place, 12 Blatch., 163; s. c., 21 Fed. Cas., 992, Case No. 12,621.

"A voluntary deed is fraudulent by operation of law where the facts and circumstances clearly show that existing creditors are thereby prejudiced without regard to whether there was an actual or moral fraud in the conveyance."

Thompson vs. Crane, 73 Fed., 327, 330.

"The general manager of a corporation, though given by its by-laws the entire charge of its business and affairs, subject to the approval of its board of directors, has no power, after he knows the corporation to be insolvent and about to be placed in the hands of a receiver, to transfer the bulk of its property to one of its creditors in payment of a pre-existing debt; and such a transfer, not authorized nor ratified by the directors, is void as to its other creditors."

Hadden vs. Dooley, 92 Fed., 274, 279; s. c., 35 C. Ct. Apl., 554.

"A bill in equity by an assignee in bankruptcy, which charged that a debtor made a conveyance for the benefit of his wife and children at a time when he was much embarrassed, and that some of the creditors at the date of the deed were still creditors at the date of the bankruptcy, was held good on demurrer, though it did not charge that the debtor was insolvent when he made the deed."

Pratt vs. Curtis, 2 Lowell, 87; s. c., 19 Fed. Cas., 1,251, Case No. 11,375.

Of the latter case this court has said:

"In the case of Pratt vs. Curtis, 2 Lowell, 87, * * * Each bill alleged that at the time of the settlement the bankrupt was indebted to persons who were still his creditors, and was embarrassed in his circumstances and that the deed was made with intent to delay and defraud his creditors.

"The demurrer to the bill was sustained on the view that the assignee in bankruptcy, and he

only, had the right to impeach the deeds in the interest of creditors."

Warren vs. Moody, 122 U. S., 132, 138.
Adams vs. Collier, 122 U. S., 382, 391.

Schleier, not being an innocent purchaser of the building for value, without notice, can not, by his conveyance and possession acquired on October 30, 1897, prevent this appellant receiver from following, recovering and reconverting into cash assets the $305,000 capital and moneys of the bank, in the form of the building.

VII.

THE TRANSACTION COMPLAINED OF,

The Bank's loss of its assets, the $305,000 building, to creditor landlord Schleier, on October 30, 1897,

WAS NOT AN EXECUTED TRANSACTION, VESTING TITLE TO THE BUILDING IN SCHLEIER, EITHER,

(1) When the lease was executed, September 12, 1889, or

(2) When the building was completed in January, 1891.

THE BANK ACT MADE THE BUILDING A TRADE FIXTURE, REMOVABLE AT ANY TIME BEFORE THE LEASE ENDED.

THE BANK'S ACTUAL POSSESSION OF THE BUILDING, UNTIL OCTOBER 30, 1897, IMPRESSED A CONTINUOUS EXECUTORY STATUS ON ITS TITLE, SO FAR AS CONCERNS SCHLEIER'S CLAIM THERETO.

SCHLEIER'S TITLE DEEDS, OF OCTOBER 30, 1897, ESTOP HIM FROM CLAIMING OTHERWISE.

The opinion says that

"when the conveyance (the lease) is made and the *funds* of the Bank have been *invested therein*, the estate so acquired becomes *an asset of the Bank*." (Record, 111, lines 6-8.)

As a transfer of title, the lease could only become executed when *nothing remained to be done* by either

the Bank or Schleier, and the transaction *had been* fully completed, or *was completed at the time* the lease was made. (McNett vs. Cooper, 13 Fed., 586.)

A contract "*executed*" differs in nothing from a grant, which, in its own nature, amounts to (a) *an extinguishment* of the right of the grantor, and (b) implies a contract not to reassert that right. (Fletcher vs. Peck, 6 Cranch, 87; 7 Myers' Fed. Dec., sections 1805, 1808.)

But, so far as this lease is analogous to a conveyance, it is simply *the conveyance* of landlord Schleier *to* the tenant Bank of the right to possession.

In no sense can this lease, either *at* the *date* of its execution, *or thereafter on the completion* of the building, be *a then* operative *conveyance* of the building by the *Bank to Schleier.*

For, to constitute a title in Schleier to the Bank building, there must have been contemporaneously united in him, (1) the *actual* possession; (2) the *right* of possession, and (3) the *right* of property. (4 Kent's Com. (12th Ed.), *373; Shelton vs. Alcox, 11 Conn., 249; 2 Blackstone's Com. (Cooley's Ed.), 195.)

He must have had both the *jus ad rem* and the *jus in re.* (1 Kent's Com. (12th Ed.), *177.)

Mr. Schleier had, and made no claim to possessing, either of these elements of title until the Bank's deeds to him, October 30, 1897.

Therefore, landlord Schleier's lease to the Bank was in no respect entitled to be viewed as a conveyance of its building, by the Bank to Schleier, either when the lease was executed, September 12, 1889, or later, when the building was completed, in January, 1891.

So long, then, on and after the execution of the lease, as the Bank retained the actual possession of its $305,000, or the building which it built with that money, any of the Bank's covenants in the lease, purporting to agree to give the building to Schleier, were *wholly executory.*

By the bank act the building was a movable trade fixture. The Bank's covenants departed from the act and common law, in,

a. That the *building* should *not* be *removable;* and,

b. The building should be surrendered to Schleier at the end of the ninety-nine-year lease.

All statutes must be read in the light of germane principles of the common law.

The substantive charter contract between the people and the Bank was, that the Bank should keep its capital and moneys "flowing in the daily channels of commerce." (Bank vs. Mathews, 98 U. S., 621.)

In so doing, the Bank's business *must*—a *mandatory* requirement—*be* transacted at "an office or banking house." (Section 5190.)

Incidentally, as an aid to the banking, *not to the real* estate business, for this sole purpose, and "for no other," the Bank was empowered to "acquire by purchase such real estate as shall be necessary for its immediate accommodation in the transaction of its business." (Section 5137.)

The sole test which determines whether the Bank building was a removable trade fixture is, "whether it is designed for purposes of trade." Neither its size, form, nor the materials of its foundations enter into the question. (Van Ness vs. Pacard, 2 Pet., 146.)

By the Bank's primary, substantive charter contract with the people, and with these creditors, its capital and moneys were trade assets, wherewith to conduct the national banking business.

Unless the Bank alone possessed the power to change its charter contract, its diversion of its entire capital from the banking business into the unlawful form of the Bank building, for a banking office, such capital still retained its statutory character of a trade asset.

As such capital it was impressed with the mandatory, non-avoidable public duty of use in the conduct of the business of a solvent national bank.

Concerning landlord creditor Schleier's title to the Bank building, his lease required:

> "Within eighteen (18) months from February first, 1890, at their own (the Bank's) cost and expense, to build, erect and complete a good, substantial building, *not less than* four stories in height, to cost *not less than* one hundred thousand dollars ($100,000)." (Lease, Record, page 7, folio 9; pages 54-5, folio 80.)
>
> "That said building and improvements erected or made upon said premises shall at once become a part of the realty, without any right on the part of any one whomsoever to remove the same." (Record, page 7, folio 10.)
>
> "That at the expiration of said 99 years, etc., they—the Bank—will peaceably and quietly leave, surrender and yield up to 'Schleier,' his heirs and assigns, the said demised premises, together with any and all buildings and improvements erected and made thereon." (Record, page 7, folio 10.)

Excepting the Bank's covenants (1) against removing the building, and (2) for its surrender at the end of the ninety-nine-year term, the lease was simply declaratory of the common law.

> "By the common law, a leasehold interest in land is personal property. Trade fixtures put up by the lessee, although real estate as between the lessor and himself, while annexed to the land, *yet may, during the term of the lease, be severed by the lessee*, or by one deriving title from him, and thus reconverted to their original condition of chattels. At *any time before the expiration of the term*, therefore, both the leasehold and the *fixtures may be taken on execution against the lessee*, like other personal property."
>
> Freeman vs. Dawson, 110 U. S., 264, 270.
>
> Wiggins Ferry Co. vs. O. & M. Ry., 142 U. S., 396, 415-16.

Therefore, even if these covenants were binding on the Bank—which is denied—Schleier's title to the building was executory until he gained lawful possession thereof, at the end of the lease.

If, then, the Bank's covenants and disposition of its $305,000 capital put into the building is unlawful; that is, as the opinion says, *ultra vires*, then the lease will simply be efficient to show that the Bank was not a trespasser, but built the building on the land with Schleier's consent. Not, however, with the lawful intention of parting with the title thereto. In that event the case will be analogous to the following case decided by this court, and the Bank or this appellant receiver is entitled to recover:

"The argument is that the moment the school house was completed it belonged to the owner of the land by operation of law, and therefore that he was entitled to be recompensed for it upon condemnation. The maxim *quic quid plantatur solo, solo cedit*, is not of universal application. Structures for the purposes of trade or manufacture, and not intended to become irrevocably part of the realty, are not within the rule (Van Ness vs. Pacard, 2 Pet., 137); nor is it applicable where they are erected under agreement or by consent, the presumption not arising that the builder intended to transfer his own improvements to the owner. And courts of equity, in accord with the principles of the civil law, when their aid is sought by the real owner, compel him to make allowance for permanent improvements made *bona fide* by a party lawfully in possession under a defective title."

Searl vs. School Dist., Lake Co., 133 U. S., 553, 561.

Not until Schleier unlawfully gained possession by the illegal transaction of October 30, 1897, did his claim of title take an executed form.

The form in which appellant receiver finds the assets of the Bank is immaterial, provided they are not in the hands of an innocent purchaser for value, without notice.

The fact that the Bank's $305,000 capital and money has been changed into the form of the Bank building in no manner prejudices either the comptroller's or his appellant receiver's right either to recover or reconvert the same into cash assets, for the following reasons:

1. His equitable right to follow misapplied money or other property of the Bank into Schleier's hands does not depend upon either (a) the ability to identify it, or (b) attach only to the very property misapplied, or (c) the proceeds of the property procured in place of it, (d) nor does confusion destroy the equity entirely, but converts it into a charge upon the entire mass. (Peters vs. Bain, 133 U. S., 670, 693.)

2. At his instance a court of equity has jurisdiction to reach the property of the Bank, in the hands of the original wrongdoer, creditor landlord Schleier, or in the hands of any subsequent holder, until a purchaser of it in good faith, and without notice, acquires a higher right. (Moore vs. Crawford, 130 U. S., 122, 128.)

If it is claimed that creditor landlord Schleier was not an original wrongdoer, then he is certainly not an innocent purchaser of the Bank building, for value, without notice, as we have shown.

3. When the Bank was a going concern, at any time after five years after the Bank's money went into the building (after 1895), the comptroller could have compelled the Bank to reconvert the building into a money asset, for—

a. The comptroller, under the general direction of the secretary of the treasury, was and is charged with the execution of all the laws governing national banks. (Section 324.)

In effect, he is the *alter ego* of the United States.

b. The spirit and intent of the bank act prohibits a bank from holding title to realty, not needed "for its immediate accommodation in the transaction of its business, for a longer period than five years." (Section 5137.)

c. No portion of the capital could be withdrawn in the form of dividends or otherwise. (Section 5204.)

d. The comptroller could compel the restoration of the Bank's capital, and on its failure therein, put the Bank into liquidation. (Section 5205.)

4. When liquidating a bank, the appellant receiver can, under the direction of the comptroller, upon the order of a court of record of competent jurisdiction, reconvert the bank's property into money assets. (Section 5234.)

The non-expiration of the five years given to banks within which to reconvert real estate into cash assets, together with the then existing panic, perhaps explains why the comptroller only assessed this Bank's shareholders, when it failed in July, 1893, instead of ordering it to then get its capital out of the Bank building.

The consequences flowing from Bank's possession of building as an asset until transaction of October 30, 1897, were:

1. Schleier's claim of title thereto, under the lease or otherwise, was *wholly executory.*

The opinion says: "The act ('wrongful expenditure' of Bank's $305,000, under Bank's covenants) complained of was not *malum in se*, but, at most, was simply *ultra vires.*" (Record, page 109, lines 32-34.)

This honorable court has said:

> "A party to a contract, the making of which, although prohibited by law, is not *malum in se*, may, *while it remains executory*, rescind it and recover money by him advanced thereon to the other party who had performed no part thereof."
>
> Spring Company vs. Knowlton, 103 U. S. Rep., 57, 60.

The appellant seeks *no accounting* or recovery of *past rents already paid* to Schleier, the consideration for past occupation of the premises.

The charter duty impressed by the bank act, upon the Bank's $305,000 capital, was a continuing, non-avoidable duty to the public, which is analogous to the public duty incumbent upon railroads, which they may not by contract abandon.

The action looks wholly to *longer* avoiding a continuing breach of its charter contract as a national bank in the future, for the remainder of the lease. It seeks the restoration of such capital to the performance of the public duties, and subjection to the liability imposed by the lawful conduct of a national bank, under the bank act. It is analogous to the following cases of the unexpired term of railroad leases.

Thus, where a twenty-year lease was made, and the lessors resumed possession at the end of five years, the accounts for that period being adjusted, a condition in the lease to pay the value of the unexpired term is void, the case not coming within the principle of executed contracts, originally ultra vires. (Thomas vs. Railroad Company, 101 U. S., 71, 86-7; Panco vs. St. L. & A. Rd., 118 U. S., 290, 316-17.)

"A court of equity, upon a bill filed by a corporation, will rescind a contract still executory, into which it has entered, where the same is ultra vires and against public policy, although *all the stockholders* may have either *expressly assented* thereto or acquiesced for a season therein, *and in its partial execution* by the other party."

New Castle Northern Ry. Co. vs. Simpson, 21 Fed., 533.

The suggestions of the learned appellate court, "while the matter was *in fieri*, no stockholder or other person authorized to complain, nor the United States," took "any steps to arrest the unauthorized expenditure" (Record, page 109, lines 27-32), are without force, because:

(1) In this country bank corporate franchises are creatures of *express legislative* act. (Bank vs. Dandridge, 12 Wheat., 6468; Bank vs. Earl, 13 Pet., 579.)

(2) In this case the pleadings reveal *no legislative* knowledge, but *only* notice or *knowledge* by *executive* and *administrative* officials, namely, by the comptroller and his officials.

The basis and measure of all executive power is the *warrant of law*, statutory and common.

The executive department in every instance *must show authority of law* for its action. (Cooley's Const. Lim. (6th Ed.), 435.)

Therefore, no act of delay or omission by the executive official, the comptroller or of any of his subordinates, can in the slightest degree modify or extend this National Bank's corporate franchises.

The demurrer was *general*, and was sustained for *want of equity*, and we will not stop to consider whether *laches* comes under the head of *want of equity*, for,—

> "One who is in continuous and peaceable possession of property may wait until his title and possession are attacked before setting up equitable demand, without being chargeable with laches."
>
> Ruckman vs. Cory, 129 U. S., 387, 390.
>
> Simmons Creek C. Co. vs. Doran, 142 U. S., 417, 442, 448-9.
>
> Buchannon vs. Upshaw, 1 How., 56, 84.
>
> Massenberg vs. Denison, 71 Fed., 618, 625.

The Bank's actual possession preserved the right to rescind the *ultra vires* act of the wrongful expenditure of its $305,000.00 capital in the building.

> "A corporation issuing illegal and ultra vires bonds and mortgage not guilty of laches, which would defeat its right to impeach same *where its possession* of the property is *uninterfered with* until commencement of suit to foreclose."
>
> Gunnison Gas & Water Co. vs. Whittaker, 91 Fed., 191.

No amount of delay in so doing could in the least degree prejudice the right to rescind, while the Bank had actual possession.

> "Laches is not, like limitation, a mere matter of time, but principally a question of the *inequity of permitting the claim* to be enforced —

an inequity *founded upon some change* in the condition or relations of the property or parties."

Galliher vs. Cadwell, 145 U. S., 368, 373.

On the contrary, the lapse of time during the Bank's possession, operates rather advantageously than as a bar. (May's Heirs vs. Fenton, 8 J. J. Marsh, 306, 309.)

2. Therefore, the government, the comptroller, the Bank, for itself or as representing these its then creditors, had the right at any time during such possession, to take any action deemed proper, for a rescission of the lease with Schleier, and the recovery of its $305,000.00 capital and money.

3. The recording of the lease was without avail for any purpose, because,

a. Actual possession outranks constructive notice by record title, since such possession is always notice of all equities and claims of the possessor, and always puts those intending to deal with the record title (appellant receiver and these creditors were *not so dealing*) upon inquiry.

"Actual possession is continual claim of the highest and most notorious character. Possession is the end and aim of real actions. It is the most specific assertion and pursuit of right which a claimant himself can make.

"Possession under a claim of right is an assertion of that claim and an acting on it every day, month and year, during the continuance of such possession. It is an assertion of claim, be that legal or equitable, with notice to all adversary claimants. It is a notice of claim, from which the adversary can not escape by alleging

ignorance of the fact. Law and equity bind him to know it, and to notice it at his peril. * * *

"Possession is favored in law. Possession of things, personal or real, ripens by length of time into a perfect and indefeasible title.

"The lowest and most imperfect claim to land by mere naked possession or actual occupation, without any shadow or pretense of right, may ripen, by continuance, into an apparent right of possession; next into an actual right of possession, and, lastly, into a complete title, comprehending the jus duplicatum droit droit, or the double right of seizin and right of possession combined.

"In equity, length of possession is equally favored and protected."

Barbour vs. Whitlock, 4 T. B. Mon., 180, 193-4.

b. If, as at common law, the lease was only a chattel real and not real estate, then the Colorado recording law would have no application, and the record of the lease no force. (Burck vs. Taylor, 152 U. S., 653-4.)

c. If it was real estate, still the recording acts had no application, because,

Neither the government, the comptroller, nor the Bank's creditors, the depositors of the People's Savings Bank, were dealing with the record title to the land in doing business with the Bank.

The Colorado courts of last resort decide (a statutory rule of property this court has declared itself bound to follow), as the language reads, that the act does not bind others than those *dealing with the record title*, as *subsequent* purchasers, etc. Mills' Stats.,

593, section 446; Rose vs. Dunklee, 12 Colo. Apl., 403, 414.)

d. By the bank act, the government, the comptroller and the Bank's creditors obtain, and are entitled to obtain, their information of the Bank's assets and condition, from,

(1) The required statutory sworn reports of the bank officials, made five times each year to the comptroller, published in the Denver newspapers. (U. S. Stats., section 5211; Ball, page 211.)

(2) The frequent and unexpected examinations of the Bank's books and affairs, by the government agents, the bank examiners, reported to the comptroller. (U. S. Stats., section 5240; Ball, pages 238-239.)

The bank act neither contemplates nor requires that either the government, the comptroller or its creditors shall examine or take notice of the record titles of real estate, to be fully informed about the financial condition or business affairs of a national bank.

The Bank's possession of the building, under the circumstances, gave the Bank a credit,—

(a) With the government, the comptroller, and

(b) With these creditors, its depositors, not to be gainsaid by Schleier,

Entitling their appellant receiver to complain, upon demands prior and paramount to Schleier's executory claim of title to the building.

Such possession preserved the Savings Bank's right to sue from August 1, 1889, to day suit was commenced, resulting in $475,825.71 judgment.

If the bank had parted with, instead of duly retained, the actual possession of the building, it would, to that extent, have impaired its credit, and warned the government, the comptroller, and its creditors, the People's Savings Bank depositors, not to trust it too far. (Sexton vs. Wheaton, 8 Wheat., 229, 250-1.)

It is the Bank's actual possession of the building which gave it a real or false credit status with the government, the comptroller, and its creditors, the People's Savings Bank depositors, which entitles them to complain of the Bank's *ultra vires* disposition of the building to Schleier. (Graham vs. R. R. Co., 150 U. S., 153.)

a. The appellant's receiver represents Fermor J. Spencer, assignee of the People's Savings Bank.

Fermor J. Spencer, assignee of the People's Savings Bank, represents the Savings Bank, and that Bank represents its several thousand small savings depositors.

b. The relation between the receiving National Bank and its depositors, the Savings Bank and their depositors, was that of debtor and creditor. (Bank of Republic vs. Millard, 10 Wall., 152, 155-6; Thompson vs. Riggs, 5 Wall., 663, 678; Marine Bank vs. Fulton Bank, 2 Wall., 252, 256-8; Bank of Ky. vs. Wister, 2 Pet., 325; Hardy vs. Chesapeake Bank, 51 Md., 562; s. c., 34 Am. R., 325, 328; Ward vs. Johnson, 5 Ill. App., 30; Davis vs. Smith, 29 Minn., 201; Aetna National Bank vs. Fourth National Bank, 46 N. Y., 82; Dabney Bank of State of S. Carolina, 3 S. Car., 124.)

c. The Savings Bank and its small depositors were creditors of the National Bank, entitled to com-

plain from the time of the National Bank's organization, August 1, 1889, down to the present time.

For (1) *The judgment* for $475,825.71, rendered November 20, 1889, against the National Bank, in favor of Spencer, as assignee of the Savings Bank, in suit commenced June 26, 1897, represents *the balance* found *due* from the National Bank to *the People's Savings* Bank and its depositors covering the period of time from the organization of the National Bank, August 1, 1889.

This judgment relates back to the very first day and date (August 1, 1889), when these creditors, the Savings Bank and its small depositors, commenced to make their deposits with the National Bank. The accounts upon which judgments were founded may be looked to for the purpose of showing that the debtor was in debt at the date of the conveyance. (Hinde's Lessee vs. Longworth, 11 Wheat., 199, 211.) Howe vs. Ward, 4 Me., 195:

> "The date when the agreement or obligation came into existence governs the complaining or attacking creditors' rights."
>
> Wood on Fraud, Conv. & Cred. B., section 90.
>
> Thompson vs. Crane, 73 Fed., 327, 331.

From the moment, on August 1, 1889, that the Savings Bank became depositor and creditor of the National Bank, the latter Bank owed to the Savings Bank the duty to satisfy its claim from the corporate funds. (Singer vs. Upton, 91 U. S., 56, 60; Taylor on Corporations, 4 Ed., section 651, 665.)

Successive renewals of the claims of these depositors, although not due at the time of the actual unlawful transaction between Schleier and the National Bank, do not prejudice their right to complain. (McLaughlin vs. Bank of Potomac, 7 How., 220, 228; King vs. Doane, 139 U. S., 172; Preston Natl. Bank vs. Pierson, 112 Mich., 438; s. c., 70 N. W., 1013, 1014, 1015; Lee vs. Hollister, 5 Fed., 752, 757.)

d. This duty owing by the National Bank entitled the Savings Bank to follow and recover the corporate assets of the National Bank until they passed into the hands of an innocent purchaser for value without notice. (Moore vs. Crawford, 130 U. S., 122, 128; Singer vs. Upton, 91 U. S., 56, 60; Curran vs. State, 15 How., 304, 307; Railroad Co. vs. Howard, 7 Wall., 393, 409; Chicago, etc., Ry. Co. vs. Chicago Bank, 134 U. S., 276; Taylor on Corporations (4th Ed.), section 668; Bodley vs. Goodrich, 7 How., 276; Cleveland vs. LaCrosse, 5 Fed. Cas., 1,036; Taylor on Corporations (4th Ed.), section 656; Wood vs. Dummer, 3 Mason, 308; Union Natl. Bank vs. Douglas, 1 McC. Cir. Ct., 86.)

e. Schleier's title to the Bank's $305,000 capital and moneys—the building—was executory, both in form and substance, until the transaction of October 30, 1897. The National Bank was under obligation to pay these Savings Bank's depositors, represented by the appellant receiver, ever since August, 1889. Schleier was not an innocent purchaser without notice. The opinion says: "The act complained of ('the unauthorized expenditure') was not *malum in se*, but was simply *ultra vires*." (Record, page 109, lines 32, 33.)

The opinion further correctly states that appellant receiver "is vested with all the rights of creditors, and may challenge any wrongful act which creditors can challenge." Record, page 109, lines 40-4.)

This court has said that acts not *malum in se*, but simply *ultra vires*, where they are executory, may be rescinded and properly recovered. (Spring Co. vs. Knowlton, 103 U. S., 57, 60.)

Therefore appellant receiver's rights to a recovery, on behalf of the Savings Bank's depositors, of the National Bank's $305,000 capital and moneys—the building—is prior in time, and therefore paramount to Schleier's claim of title to the building.

VIII.

THE NATIONAL BANK'S CHARTER CONTRACT WITH THE SAVINGS BANK WAS,

THAT THE FORMER'S CAPITAL, WITH THE LATTER'S DEPOSITS AND THOSE OF OTHERS, SHOULD,

(a) Not be embarked in realty transactions for the private profit of the former's shareholders, but

(b) Should be generally held in the form of currency and cash items, and,

BE UTILIZED TO PROVIDE A CURRENCY, according to the terms of the bank act, to promote trade and commerce,

SO THAT, AS A SOLVENT, GOING CONCERN, THE NATIONAL BANK COULD,

on the Savings Bank's demand, made in the due course of business,

PAY ITS DEBTS IN FULL IN CURRENT FUNDS.

BY PUTTING ITS $305,000 INTO THE BUILDING, UNDER THE LEASE, THE NATIONAL BANK DISABLED ITSELF FROM KEEPING SAID CONTRACT,

TO THE LOSS BY THE SAVINGS BANK AND ITS DEPOSITORS,

THE UNPAID JUDGMENT OF $475,825.71.

THE NATIONAL BANK'S TRANSFER OF THE $305,000 BUILDING TO SCHLEIER

TO SATISFY HIS $6,000 DEBT,

While the Bank

1. Was insolvent,
2. Was in dissolution.

3. Was being sued by the Savings Bank and depositors,
4. Had agreed, in such suit, not to dispose of the building,

WAS AN ULTRA VIRES DISPOSAL OF ASSETS, IN VIOLATION OF ITS CHARTER CONTRACT WITH SUCH CREDITORS, TO THEIR INJURY, WHICH,

1. Being executory as to vesting title, and
2. Schleier not being an innocent purchaser,

GAVE APPELLANT RECEIVER, REPRESENTING SUCH CREDITORS, THE RIGHT TO FOLLOW AND RECOVER SUCH ASSETS TO SATISFY THEIR $475,825.71 JUDGMENT.

I. The charter of a corporation is a contract. (Dartmouth College vs. Woodward, 4 Wheaton, 518, 624, 636, 637, 643-4, 658.)

The National Bank's substantive corporate charter contract is contained in that general law, The National Bank Act.

Therefore, the subject of *ultra vires* is a branch of the law of contracts, statutory in form.

II. The *charter* of a national bank is *a contract*,

(a) *Primarily*, between the United States and the incorporating and successive stockholders of the bank. (Dartmouth College vs. Woodward, 4 Wheaton, 518, 643-4; B. & L. Rd. Co. vs. S. L. Rd. Co., 2 Gray, 1, 29; State vs. Noyes, 47 Me., 189, 205; West River Bridge Co. vs. Dix, 6 Howard, 507, 532; s. c., 7 Myers Fed. Dec., 451, section 2189; Brewer, J., in C. R. I. & P. Co. vs. U. P. Co., 47 Fed., 15.)

(b) *Secondarily*, a contract which enters into every contract between such national bank and every one who deals with it.

"All persons dealing with these institutions can only acquire and enforce rights against them, under the limitations there designated." (Bank vs. Colby, 21 Wall., 609, 612.)

For, every one who deals with a national bank is bound to know the general statutes, the national bank act, i. e., the national bank's charter contract, and, as a law abiding citizen, is equally bound with the bank to observe such general law the bank's charter. (West River Bridge Co. vs. Dix, 6 Howard, 507, 532; s. c., and Myers Fed. Dec., 451, section 2189; People vs. Security L. F. Ins. & Anty. Co., 78 N. Y., 114, 125.)

It is to compel business corporations to observe their charter contracts to the state, to their creditors and their stockholders, that their acts beyond the powers conferred by its charter are held void as *ultra vires*. (The Railway Cos. vs. Keokuk Bridge Co., 131 U. S., 371, 384; Central Trans. Co. vs. Pullman Car Co., 139 U. S., 24, 48; Cala. Bank vs. Kennedy, 167 U. S., 362, 368; Concord First National Bank vs. Hawkins, 174 U. S., 364, 370-1.)

The following terms entered into the charter contract of the National Bank with the Savings Bank and its depositors, here represented by this appellant receiver:

1. The People's National Bank was a quasi public corporation, not created to subserve the mere private interests of its stockholders, but a government instrumentality,

created for the public purpose of promoting trade and commerce by furnishing a national currency.

(1) A national bank may be a bank of discount, deposit and circulation. (Oulton vs. Savings Institution, 17 Wallace, 109, 118-19.)

(2) They are quasi public institutions. (Knickerbocker Life Ins. Co. vs. Pendleton, 115 U. S., 339, 344; Foll's Appeal, 91 Penn. St., 434, 437.)

That is, they are instrumentalities of the federal government, created for a public purpose. (Davis vs. Savings Bank, 161 U. S., 275, 283; McClellan vs. Chipman, 164 U. S., 347, 357.)

(3) They are not created to subserve the mere private interests of their stockholders. (Bank vs. Lanier, 11 Wallace, 369, 374.)

(4) They are federal government instrumentalities, created for the public purpose of furnishing a national currency. (National Bank vs. Colby, 21 Wallace, 609, 612; F. & N. M. Bank vs. Dearing, 91 U. S., 29, 33-4; s. c., 3 Myers Fed. Dec., 298.)

Currency is essential to that exchange of goods, productions or property of every kind called commerce.

The federal government is vested with the powers of regulating commerce and also to coin money, regulate the value thereof and of foreign coin. These grants impose the mandatory public governmental duty of providing a currency, to facilitate the exercise of the natural right of contract of its citizens in their dealings with each other, and the performance and maintenance of government, federal and state.

2. The entire charter contract of The People's National Bank with the Savings Bank and its depositors, comprising both its substantive banking and the incidental, subordinate and secondary powers, is the creature of that express public statute, the national bank act, which is to read in the light of any general laws applicable.

Both the primary, substantive banking powers and the incidental secondary powers considered as inseparably incident, at common law, to every created corporation (1 Bl. Com. (Cooley's Ed.), 175-6), are the *creatures of express* grant in the national bank act.

That act is considered as "constituting by itself *a complete* system for the establishment and government of national banks. Everything is fully provided for as in *a separate code* by itself." (Cook Co. Natl. Bank vs. U. S., 107 U. S., 445, 448; Natl. Bank vs. Colby, 21 Wall., 609, 612.)

National banks being chartered under *a general law*, the rule of *strict* construction to keep the banks within their charter contract, and advance them as remedial public instrumentalities in furnishing currency to promote trade and commerce, *applies with still greater* force. (Oregon Ry. Co. vs. Oregonian Ry. Co., 130 U. S., 1, 26-7; N. O. Natl. Bank vs. Wiltz, 10 Fed., 330, 332.)

Therefore, the construction of the charter contract between the National Bank and these creditors depends upon the true construction of the statute, the bank act. (Bullard vs. Clark, 18 Wall., 589; s. c., 3 Myer's Fed. Decs., 220; Bank vs. Dandridge, 12 Wheat., 64, 68; Bank vs. Earl, 13 Pet., 579.)

3. The following general principles, applicable to corporate charters, serve to interpret the charter contract in question:

a. The contract power of this National Bank, like that of every corporation, was, in a way, the converse or antithesis of the contract power of a natural person.

> "The distinction between natural persons and corporations is, that the *former* may *make any* contract *not prohibited* by law or against public policy, the *latter* can exercise *no powers not expressly conferred* on them *by* their *charters.*" (Reese on Ultra Vires, 8, section 5; Mathews vs. Skinner, 62 Mo., 331; Abbey vs. Billups, 35 Miss., 618, 630-1.)

b. The contract power of this National Bank was like that of every financial corporation whose entire powers are the subject of an *express* grant.

Such charter contract power was confined by prohibitions as absolute, to the limits of such affirmative grants of its charter powers, describing the general business and the mode of conducting, as if such corporate grant had been accompanied by express terms of absolute prohibition.

For,

> "(1) An affirmative grant of power in many cases will imply *an exclusion of all others.*" (1 Story on Const., section 448.)
>
> "In this case *a negative* or *exclusive* sense must be given to them, *or they have no* operation at all." (Marbery vs. Madison, 1 Cranch, 137, 174.)
>
> "(2) The charter of a corporation is the measure of its powers, and the *enumeration* of its powers *implies the exclusion of all others.*" (Thomas vs. W. J. Rd. Co., 101 U. S., 71; s. c.,

10 C. L. J., 306; Case vs. Kelly, 133 U. S., 21, 26-7.)

"The *powers of national* banking associations is to be *measured* by the act of Congress." (Bullard vs. Clark, 18 Wall., 589; s. c., 3 Myer's Fed. Decs., 220.)

"(3) Dealing in stocks by a national bank is *not expressly* prohibited. *But such a prohibition is implied from a failure to grant the power.*" (First Natl. Bank vs. Exchange Bank, 92 U. S., 122, 128.)

"(4) When *one mode of exercising* an *express* power by a banking corporation *is prescribed* in the law creating such corporation, by implication, this will seem to *forbid* the *exercise* of such power *in any other way.*" (Fridley vs. Bowen, 87 Ill., 151.)

The affirmative grants of corporate power accomplish, and, in law, serve the purpose of expressing correlative prohibitions, avoiding all corporate transactions beyond the limits of such affirmative grants.

4. This appellee National Bank, like all others, engaged under the bank act, in conducting the business of banks of deposit and circulation, was under a continuing paramount charter contract with these depositor creditors, to keep its assets (1) out of real estate, and (2) in the form of currency and cash items, in order, as a solvent going concern, to pay them, in the due course of business, the amounts of their respective deposits, now represented by the $475,825.71 judgment.

In its relations to the public and its depositors, note holders and customers, the business of conducting a bank is very different from that of any other kind of business corporation.

Modern banking is the business of dealing in debts and credits, in commerce, in which the bank mainly occupies the position of debtor.

There are hundreds of national banks whose capital represents only a comparatively small percentage of the amount of their deposits.

We have seen that the relation of a receiving national bank to its depositors is, at once, that of a debtor.

Business corporations, as debtors, are not usually under any charter contract with their creditors, binding them to keep their assets in any particular form in order to meet their demands at maturity.

Not so, however, with a national bank. As a going concern, it is under a perpetual contract with the government—the whole people—with its depositors and creditors, by the very nature of its public service in the banking business it has bound itself to carry on, to at all times keep its assets in cash and available cash items. Otherwise, it can not perform its charter contract with its depositors and customers as such a bank.

Congress has manifested the greatest solicitude to maintain the solvency of national banks, to enable them, in the due course of business, to repay their creditor depositors in currency, by hedging about the charter contract powers of the banks with a number of restrictions, of which this court has said:

> "The object of the restrictions was obviously threefold:
>
> > "(1) It was to keep the capital of the banks flowing in the daily channels of commerce;

"(2) To deter them from embarking in hazardous real estate speculations; and

"(3) To prevent the accumulation of large masses of such property in their hands, to be held, as it were, in mortmain." (Bank vs. Mathews, 98 U. S., 621.)

Therefore, national banks are quasi-public corporations.

Their charter contract with the United States, and with each of their depositors, is to aid in promoting trade and commerce between the people of the United States—

(1) By supplying their circulation notes as a medium of exchange in trade and commerce.

(2) By providing safe places for the *deposit, payment and disbursement of government* as well as *private* funds and revenues.

(3) By affording convenient places where temporary loans can be secured by private individuals, upon giving "personal" security.

The contract of each national bank is, that it shall keep its assets generally in currency, cash items, discounts, etc., readily convertible into cash, and utilize the same to carry on and conduct its business as a bank of deposit, discount and circulation, as stipulated in the acts of Congress, by keeping its assets in capital flowing in the daily channels of commerce.

The limitations provided in the national bank act are intended to promote the keeping of the capital of the bank flowing in the daily channels of commerce, by deterring them from—

(a) Embarking in hazardous real estate speculations, or

(b) Accumulating a large mass of real and other property in their hands, to be held, as it were, in mortmain.

In effect, the national bank act, as the charter contract between the national bank and its depositors, must be read into the contracts comprising the transactions between Schleier and the National Bank.

These prohibitions in the charter contract of the National Bank render void all non-conforming stipulations contained in Schleier's contracts with the National Bank.

> "When the laws of the county or state provide restrictions upon individuals or corporations, foreign or domestic, which regulate the manner in which they shall do their business, or forbid them to do such business absolutely, or except under certain conditions, any contract with such corporation or individual, which, if sanctioned, would encourage them to evade such laws, is void." (Greenwood, Pub. Pol., 541.)
>
> Gibbs vs. Baltimore Gas Co., 130 U. S., 410.

> "Any act which is forbidden, either by the common or statutory law, whether it is *malum in se* or merely *malum prohibitum;* indictable or only subject to a penalty for forfeiture; or, however otherwise prohibited by the statute or the common law, can not be the foundation of a valid contract; * * * and this doctrine is the same in equity tribunals as in those of law." (Bishop on Contr. (Enl. Ed.), section 471; Hedges vs. Dickson County, 150 U. S., 182, 192; s. c., 37

Fed., 304; M. & S. C. Co. vs. C. C. T. P., 45 Fed., 336.)

"The mere tendency of a contract to promote unlawful acts renders it illegal, as against the policy of the law, without regard to any circumstances indicating the probable commission of such acts." (Bishop on Contr. (Enl. Ed.), sections 476, 525.)

As a quasi public corporation the People's National Bank could not make any binding valid contract with Schleier which would prevent, deter, impair, or tend to impair its ability to perform its public duties of supplying a currency by keeping its assets in the form of cash, and utilizing them according to the terms of the bank act, to promote, to promote commerce between the citizens of the city of Denver and elsewhere.

Therefore, when it is said in the opinion that—

"Nor do we perceive any reason why a national bank, when it purchases or leases property for the erection of a banking house, should be compelled to use it exclusively for banking purposes. It should be accorded with the *same rights that belong to other land-owners* of improving it in a way that *will yield the largest* income, lessen its own rent, and render that part of its funds which are invested in realty most productive." (Record, pages 106-7, lines 49-50, 1-5.)

"When an occasion arises for an *investment* in real property, for either of the purposes specified in the statute, *the national bank act permits* banking associations *to act as any prudent person* would act in making an investment in real estate, and to *exercise the same measure of judgment and discretion.*" (Record, page 107, lines 15-19.),—

the statement is not the law. A national bank has not, and never had for any purpose, the same unlimited discretion as an individual to "invest" its currency assets in realty.

The learned Court of Appeals practically so admitted before finishing its opinion.

It found itself unable to follow these premises to their legitimate conclusion. For, instead of saying that, therefore, the expenditure by the National Bank of all and more than its entire capital—$305,000—in the Bank building was lawful, it said:

> "The act complained of ('unauthorized expenditure' of the $305,000.00 capital and moneys) was not *malum in se*, but at most was simply *ultra vires*." (Record, page 109, lines 32-4.)
>
> "There are some *ultra vires* acts, when committed by a national bank, which the government alone is permitted to call in question *after such acts are committed*." (Record, page 110, lines 22-4.)
>
> "Moreover, when the conveyance is made (lease), and the *funds of the bank* have been *invested* therein, the estate so acquired becomes an asset of the bank." (Record, page 111, lines 6-8.)

These remarks suggest a limitation wholly immaterial to the rights of corporate creditors in collecting their debts.

The *ultra vires* acts of corporations with their assets are void, as to their then creditors, whether prohibited, or *malum in se*, or both, because such conduct is unlawfully prejudicial to their right to obtain payment of their debts out of the corporate property. Their rights to complain are not limited to *malum in*

se, ultra vires acts. (Waite on Fraud. Con. and Cred. Bills (2d Ed.), 567-8, section 411.)

> "The distinction between *malum in se* and *malum prohibitum* has long since been exploded." (Gibbs vs. Baltimore Gas Co., 130 U. S., 411-12.)

Whether exploded or not, a contract by a party to wilfully break a prior contract, embodied in a general law, comes very close to being an act evil in itself, at least for the purposes of civil liability.

It was further said:

> "The *case* is *not one* where the Bank assumed to exercise a *power which did not belong* to it, but it is a case where, in the exercise of a power which was clearly conferred, it misused or abused it by making *a greater expenditure for an authorized* object, than it ought to have made." (Record, page 109, lines 19-24.)

How an *ultra vires* transaction with the capital and assets of a banking corporation, continually bound by its charter contract with the government and its creditor depositors to keep its capital and money assets, in currency and cash items, so that as a going, solvent concern it may, in the due course of business, pay them their demands and, at the same time, "a greater expenditure than it ought to have made" in debarking such assets out of the banking business into the real estate business, can be said to be "*not malum in se*," but "for *an authorized* purpose," we confess we are at a loss to know.

We have shown that the subject of *ultra vires* belongs to the domain of *statutory contracts.*

It is a general principle of the law of contracts and statutes that two things must concur to enable one to sue for a breach of duty, whether imposed by contract or statute, viz.:

(1) The *plaintiff*, or those whom he represents, must be *within the purview* or protection *of* such *duty* imposed by such contract or statute, and

(2) He, or they, must sustain *damages* flowing from such breach of duty, touching the subject matter thereof.

This is the principle which explains the apparently conflicting decisions in the law of *ultra vires*.

> "The party injured by the violation of the law is the only one who can raise an objection." (2 Morse on Banks and Banking, 3d Ed., section 273.)

Therefore *existing* creditors may sue, and *subsequent* creditors may not sue for an *ultra vires* disposition of corporate assets. The duty and damage existed for the former, but not for the latter.

> "It is not and never has been true, except under the facts of peculiar cases, that the state is the only party which can challenge an *ultra vires* or prohibited contract made by a corporation. * * * A receiver or other judicial assignee standing in the right of its creditors and stockholders, may prosecute such action." (5 Thompson on Corp., section 6034; 2 Cook on Stock and Stockholders, section 665.)

A receiver representing the rights of creditors may maintain actions to recover moneys paid on

illegal or fraudulent claims to persons assuming to be creditors. (Taylor on Corp. (4th Ed.), 814.)

A receiver may assert the rights of creditors when affected by fraudulent or illegal acts of corporations. (Whittlesey vs. Delaney, 73 N. Y., 571, 574.)

He may reclaim bond exchanged, by the bank, prior to his appointment, with a director, for his stock in the bank. (Gillette, Rec., vs. Moody, 3 N. Y., 479.)

He may reclaim securities transferred by it in violation of the law. (Talmadge vs. Pell, 7 N. Y., 328; Bank Comrs. vs. St. Lawrence, 7 N. Y., 513; Atty. Gen. vs. Guardian Mut. Ins. Co., 77 N. Y., 272; Ellis vs. Little, 27 Kan., 707; Hayden vs. Thompson, 71 Fed., 64-65; Bank vs. Dovetail, etc., Co., 143 Ind., 543.)

A receiver may set aside dispositions of corporate assets in violation of general rules of law applicable to corporations.

Thus, he may avoid its chattel mortgage on the ground that it was not filed according to law. (F. L. & T. Co. vs. Minneapolis, etc., Wks., 35 Minn., 543; Bain vs. Brewer Pottery Co., 90 Fed., 754.)

Here the appellant receiver represents the People's Savings Bank and its depositors, holding an unsatisfied judgment against the National Bank for $475,825.71. This judgment relates back to the commencement of business of the National Bank on August 1, 1889, when the National Bank, as the depository of the Savings Bank and its depositors, occupied, towards them, the debtor relation.

The National Bank was under a prior and paramount contract—its charter—to devote its capital and moneys to the *public* purpose of conducting a

solvent bank of deposit, discount and circulation. Its shareholders were bound to content themselves with the profits to be realized from its capital, used in that banking business.

They could not lawfully divert the Bank's entire capital into dealings in real estate.

By the language of the act, any expenditure in excess was as much prohibited as if the whole expenditure was forbidden, for the reasons following:

The transaction between Schleier and the Bank, whereby it put its $305,000 capital into the eight-story building, of which it and the Savings Bank occupied one-half of one floor, which was not to be removed, and eventually be surrendered to Schleier, violated the letter and spirit of the national banking act, in the following particulars:

(1) It amounted to a permanent withdrawal of its capital—amounting to only $300,000—from the banking business, which is prohibited by the act.

> "Sec. 5204. *No association*, or any member thereof, *shall*, during the time it shall continue its banking operations, *withdraw, or permit to be withdrawn*, either in the form of dividends or otherwise, *any portion of its capital*," etc.
>
> U. S. Rev. St., section 5204.
>
> Ball on Natl. Banks, 204.
>
> Bolles, Natl. Bank Act, 58, section 125.
>
> Pratt's Digest, 1900, 98.

It is to be borne in mind that this case is not like that of solvent national banks in large cities. Their stockholders adopt the plan of carrying a large cash

surplus, out of which, instead of dividing the same in dividends among themselves, they devote it to the purchase or building of an expensive office or bank building, far more commodious than is required for their banking business.

With that practice, by rich national banks, we have no concern in this case.

This National Bank was authorized and actually commenced business on August 1, 1889. It had not been in business longer than one month and eleven days when it made the lease with Schleier, calling for the erection of the enormous and expensive building, in which it put its entire capital and more, $305,000.

(2) The personal covenant of the Bank to pay Schleier rent for ninety-nine years, at the rate of $13,975. amounting, in the aggregate, to $1,383,525, was a non-banking contract, incurring an indebtedness exceeding the amount of its $300,000 capital stock, in violation of the act.

"Sec. 5202. *No association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock* at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:

"*First.* Notes of circulation.

"*Second.* Moneys deposited with or collected by the association.

"*Third.* Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.

"*Fourth.* Liabilities to the stockholders of the association for dividends and reserve profits."

U. S. Rev. St., section 5202.

Ball on Natl. Banks, 204.

Bolles, Natl. Bank Act, 52, section 106.
Pratt's Digest, 1900, 97-8.

On reading this section in the light of the definite purpose of Congress—to keep the banks as solvent, going institutions, providing currency for trade and repayment of their debts to depositors—it is seen that the *only contracts excepted* from the prohibition *are banking* contracts.

All other contracts, whereby a bank "shall (1) *at any time*, (2) *be indebted*, or (3) *in any way liable*, to an amount exceeding its capital stock," are prohibited in terms.

(a) The opinion confused the landlord's remedy with the tenant's substantive obligation on personal covenant.

The opinion started out to avoid this prohibition by citing *Lorillard vs. Clyde* (142 N. Y., 456) as an authority that "The *personal covenant* to pay rent would not be enforcable against 'the Bank' *after the* expiration of its charter." (Record, 108, lines 2-4.)

That case was a contract to pay over the dividends of a corporation, in existence when the contract was made, but since dead by the expiration of its charter, and was properly held to be at an end. When the corporation died, it could no longer pay dividends, and the subject-matter of contract ended. But possession conferred by a lease for a longer term than the corporate life of a bank is still existing subject-matter for the contract of lease.

But, as the chartered life of a bank is twenty years, that left seventy-nine years' rental at $13,975 per annum, amounting to over $900,000, still to be

accounted for in this case under this statutory prohibition.

So, finally, the opinion on this point was—

> That while the 99-year term lease was valid to vest *the entire 99-year term*, at the execution of the lease, *an asset in* the Bank (Record, 107, lines 37-45), *yet* the *Bank's personal covenant to pay rent* for such 99-year term was *not binding*. (Record, 108.)
>
> That such *personal covenant only bound* the Bank to pay "*rent earned by actual occupation* of the demised premises." (Record, 108, lines 26 et seq.)

Consequently the 99-years' *rental*, $1,383,525, *was not an indebtedness* exceeding the Bank's $300,000 share capital, which it was prohibited from contracting by section 5202.

Rent is compensation for the use of lands demised. (2 Woods Land. and Ten. (2d Ed.), 1016, sections 44-45.)

The suggestion that the Bank could take the benefits—the ninety-nine-year term without the burdens—its personal covenant to pay rent for that term, strikes one as a little illogical, at the very least.

At any rate, it is not the law.

The opinion (Dean vs. Caldwell, 127 Mass., 242, 244, cited by opinion) erroneously confused the landlord's right to prove his claim for rent against decedent and insolvent estates, for future rent, *not yet due*—which is one matter, very separate and distinct—with the obligation imposed by the tenant's *personal* covenant to pay rent.

The fact that an action is prematurely brought, in no respect tends to show that there is not an obligation to pay, when the time fixed, by the lease or other obligation, arrives for making such payment.

The opinion also cited Trust Co. vs. Armstrong, 35 Fed., 567, which simply held that the landlord had no claim on an insolvent estate, in the hands of a receiver, unless the receiver, in the exercise of his election, determined that a lease was in fact an asset, beneficial to creditors, and so accepted the lease. In which event, being only privy in law, and so not bound by any personal covenant of the tenant, he would only be liable during actual occupation of the premises.

These and other cases cited in the opinion in no respect correctly stated the law, as settled by this and other courts, which is as follows:

The validity of the Bank's covenant must be determined by the law at the time it was made. If valid then, it was so forever after.

"Neither *its own* act *nor* the *act* of the *law* will *release* the lessee from his *covenants*."

Hornby vs. Houlditch, Andrews, 40; 1 D. & E., 92.

Auriol vs. Mills, 4 D. & E., 99; s. c., 1 Smith's Lead. Cas. (8th Ed.), 1253. (*839, 846-7.)

"Injury by flood, fire or external violence, unless such destruction of the land as to amount to an eviction, *does not relieve* from the payment of *rent* under an *express* covenant."

Viterbo vs. Friedlander, 120 U. S., 712.

"The landlord can not claim a dividend from the estate of the tenant for *rent which has not yet accrued*, and the discharge of the tenant in bankruptcy is not a defense to a suit for rent falling due subsequently to the certificate.

"The principle is equally true, whether the proceeding is in bankruptcy or in insolvency."

Mills vs. Auriol, 1 Smith's Lead. Cas. (8th Ed.), 1267, n.

"Until the assignee or creditors' representative elect to take the term, it will remain in the lessee, with all the attendant rights and obligations, and even when the term is accepted by the assignees, and vests in them by operation of law, the lessee will still be bound by an express covenant to pay rent or perform any other duty imposed by the terms of the lease."

Mills vs. Auriol, 1 Smith's Lead. Cas. (8th Ed.), 1268, n.

"The *liability* of a lessee *on this covenant* alone will not be in any manner impaired or affected by his never taking possession, or by his act of assigning over the lease, but *remains valid* against him and his executors (having assets) *until the end of the lease*. The covenant, in the event of a tenant's alienation, affords the landlord a double claim for the payment of his rent; the assignee being chargeable in consequence of his privity of estate, and the original lessee continuing bound in respect to his contract."

1 Taylor's Land. and Ten. (8th Ed.), 434-5, section 371.

1 Washb. on R. P. (4th Ed.), 493, paragraph 4.

Sutliff vs. Atwood, 15 Ohio St., 186, 194.

Harmony Lodge vs. White, 30 Ohio St., 569, 574.

1 Wood's Landld. and Ten. (2d Ed.), 733, section 330.

Fletcher vs. MacFarlane, 12 Mass., 43, 46.

W. N. Gas Co. vs. Johnson, 123 Pa. St., 576; s. c., 10 Am. St., R. 555, and cases cited, note, page 559.

Bailey vs. Wells, 8 Wis., 141; s. c., 76 Am. Dec., 233.

Kimpton vs. Walker, 9 Vt., 199.

Walton vs. Cronley's Admr., 14 Wend., 64.

Port vs. Jackson, 17 Johnson, 239, 243-4.

Grommes vs. St. P. Trust Co., 147 Ill., 634, 648; s. c., 37 Am. St. R., 248, 255.

"Nor does the duration of the term (99 years) at all affect the obligation of such *express* covenant. * * * Indeed, it seems from the nature of the covenant itself, no distinction can be made on account of the duration of the term. It is a personal engagement to pay rent during the term, as long as assets can be found, the obligation may be enforced."

Taylor vs. DeBus, 31 Ohio St., 468, 471.

(b) The opinion attempted to engraft upon and add another exception to the four express exceptions contained in the section.

An exception nullifying the definite purpose of Congress in the bank act.

This is a power not possessed by the courts.

"The courts are not at liberty to insert limitations not called for by the sense, or objects, or the mischiefs of the enactment."

United States vs. Coons, 12 Pet., 72, 79.

"The plainest rules of propriety and justice require that the courts should not introduce an exception, the legislature having made none."

Galloway vs. Finley, 12 Pet., 264, 298.

(Demarest vs. Wynkoop, 3 Johns. Ch., 129, 142; Torrance vs. McDougald, 12 Ga., 526, 531; Endl. on Interp. Stat., page 23, section 17.)

"The distinction between an exception and a proviso is technical. The main distinction is in the matter of their pleading."

United States vs. Cook, 17 Wall., 177.

"Where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. * * * Those who set up any such exception must establish it as being within the words as well as the reason thereof."

United States vs. Dixon, 15 Pet., 141, 165.

Minis vs. United States, 15 Pet., 423, 445.

Ryan vs. Carter, 93 U. S., 78, 83.

"The exception of a particular thing from general words proves that in the opinion of the

law-giver the thing excepted would be within the general clause had the exception not been made."

Brown vs. Maryland, 12 Wheat., 438.

Arnold vs. United States, 147 U. S., 499.

"It is only where the general language of a prohibition leaves it doubtful whether a particular thing is embraced, that the exception of another thing *of a similar kind* is to be construed as showing that the first was intended to be excluded."

Tinkham vs. Tapscott, 17 N. Y., 141, 152.

Black on Interp. Laws, 277.

"An express exception, exemption or saving excludes others. Where a general rule has been established by statute, with exceptions, the court will not curtail the former, nor add to the latter by implication." (Suth. on Stat. Constr., 414, section 328.)

"Express exceptions exclude others." (Suth., Stat. Constr., 412, section 326.)

"The statute having provided the way in which these half-breed lands can be sold, by *necessary implication prohibits* their sale in any other way."

Smith vs. Stevens, 10 Wall., 321, 326-7.

The construction of the opinion would result in throwing down the bars which Congress put up to preserve national banks as going, solvent concerns, and so is not permissible in any sound view of the law.

We regard this point as concluded by the principles of the following decision by this court, in which it is said:

"The legal existence of a national bank is not cut short by its insolvency and the consequent appointment of a receiver.

"After passing into the hands of a receiver, appointed by the comptroller of the currency, under the provisions of the Revised Statutes, a national *bank remains liable, during the remainder of the term*, for accrued and accruing rent under a lease of the premises occupied by it, although the receiver may have abandoned and surrendered them."

Chemical National Bank vs. Hartford Deposit Company, 161 U. S., 1.

The conduct denounced was "(1) at any time, (2) be *indebted*, or (3) in any way liable, &c.," in excess of its $300,000 share capital.

Therefore, the People's National Bank, by personally covenanting, in Schleier's lease, to pay him 99 years' rent, amounting to $1,383,525.00, did attempt to make a non-banking contract which was expressly prohibited by section 5202, and, therefore, absolutely void as tending to impair the Bank's ability to carry out the definite purpose for which its existence was solely authorized, the conduct of a *solvent* banking, and *not* the real estate business.

But, as has been elsewhere said (ante, page..), if the transaction was not illegal and *ultra vires* on this point, it was, nevertheless, invalid upon the other horn of the dilemma, viz., the gross inadequacy of consideration in allowing Schleier, as a creditor, for less than $6,000, with full knowledge, to take a $305,000 asset, the Bank's capital, the building, from the insolvent Bank, which agreed, in the pending suit, *not* to dispose of the building, on consideration of

protecting and releasing the Bank and its stockholders from future liability on the balance of the unexpired term of the 99-year lease, and leave these then suing depositors to hold a fruitless judgment for $475,875.71.

(3) The transaction was a debarking of its capital out of the banking business and into the real estate business, in fraud of the power to acquire by "purchase," for an office or banking house, such real estate as shall be necessary for the Bank's immediate accommodation in the transaction of its business, and no more.

It was an act which tended to thwart the Bank from reconverting into currency, to be returned to the banking business, any realty not necessary for the Bank's immediate accommodation in the transaction of its business for an office or banking house, at the earliest convenient moment, but in no event longer than five years after the same was acquired.

All in violation of the bank act.

"Sec. 5190. The usual *business* of each national banking association shall be *transacted at an office or banking house* located in the place specified in its organization certificate."

U. S. Rev. St., section 5190.

Ball on Natl. Banks, 189.

Bolles, National Bank Act, 17, section 40.

Pratt's Digest, 1900, 79.

"Sec. 5137. A national banking association may *purchase, hold* and *convey* real estate for the following purposes, and for *no others:*

"*First.* Such as shall be *necessary for its immediate accommodation in the transaction of its business.*

"*Second.* Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.

"*Third.* Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

"*Fourth.* Such as it shall purchase at sales under judgments, decrees or mortgages held by the association, or shall purchase to secure debts due to it.

"But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years."

U. S. Rev. St., section 5137.

Ball on Natl. Banks, 141.

Bolles, Natl. Bank Act, 43, section 86.

Pratt's Digest, 1900, 19.

These express prohibitions upon the power of the National Bank in obtaining an office, must also be read in the light of the definite purpose of Congress, in creating such institutions.

They must likewise be read in connection with section 5202, just commented on.

The latter section expressly prohibits all contracts whereby a bank "shall, (1) *at any time*, (2) be indebted, or (3) in *any way* liable," in excess of the amount of its share capital, excepting upon four kinds of banking contracts.

This aims at preserving the solvency of the bank, as a going concern, to enable it to pay its depositors in full, in due course of business.

This same purpose is further advanced by the use of the word "purchase," in conferring the power to obtain real estate for an office.

We will not take time to determine whether the power to take a lease of a room or rooms in a building, already built, and, at most, only requiring the addition of such vaults as shall furnish a safe and convenient place for the currency, books, and other bank property, is included in this power to "purchase." That is not this case. In such a case, the most extravagant rental and terms, in an honestly made contract, could not come anywhere near absorbing the entire capital and rendering the bank insolvent, as it did in this case.

The act does not, in terms, mention the leasing of office quarters.

The seventh clause of section 5136, conferring the substantive banking powers, ends by granting "all such *incidental powers* as shall be *necessary* to *carry on the business* of banking," as thereafter expressly defined.

Section 5190 calls for an "office or banking house," so that this is sufficient to authorize an ordinary lease of quarters in a building already built.

The implied corporate power to lease quarters for "an office" does not authorize the corporation to enter into a building lease.

Schleier's lease was a building lease, involving more than the bank's entire capital, and so was not warranted by any implied authority to lease.

> "A lease is a contract for the *possession* and profits of land and tenements *on the one side,* and

the *recompense of rent* or property *on the other*." (18 Amer. and Eng. Ency. of Law, 2d Ed., 597.)

Such *implied* corporate *power* to take a lease *only extends to* carrying out the *objects* of its creation. (7 Amer. & Eng. Ency. of Law, 2 Ed., 720.)

The corporation only has "incidental power to agree to any *terms usual* in leases." (Amer. and Eng. Ency. of Law, 2 Ed., 806-7.)

The "*terms usual*" in leases, do not authorize or include the erection of a building.

> "Common and *usual covenants*," observed Lord Thurlow, in this case, "must mean covenants *incidental* to the lease." (Henderson vs. Hay, 3 Bro. C. C., 632, quoted in Taylor's Landld. and Tent., 8th Ed., 53, n. 2.)
>
> "*Usual* covenants are *implied* in all contracts for leases." (1 Woods' Landld. and Tent., 2d Ed., 347, section 183.)
>
> "They are the covenants by the tenant (1) to pay rent, (2) to pay taxes, (3) to keep the premises in repair; and, (4) to allow the landlord to enter to see the state of repair." (1 Woods' Landld. and Tent., 2d Ed., 349, section 183.)
>
> "A *covenant to build*, will *not* be *implied* or held as applicable to the relation, even though the agreement stipulates for such covenants in the lease." (1 Woods' Landld. and Tent., 2d Ed., 103, section 24.)

Therefore, there is no warrant of law, under the implied power to lease in order to obtain an "office," authorizing the People's National Bank to attempt to debark its capital out of the public service of conducting a solvent national bank, into the real estate and

renting business, for the private profit of its shareholders, by entering into this building lease, and erecting the eight-story building, with its $305,000.00 capital.

The power to "purchase such" real estate "as should be necessary for its immediate accommodation in the transaction of its business," did not warrant the National Bank in making the covenants and embarking $305,000 out of its banking business into the real estate and renting business, for the private profit of its shareholders, and to the insolvency of the Bank and the loss of these depositors.

The learned appellate court seemed to think that because, by a "purchase," it was possible to obtain a title in fee simple absolute to real estate, that, therefore, it conferred and contained power, by the Bank, to take anything savoring of realty, even to a chattel real—a lease, the bare right to possession—good only so long as the rent is paid, and that, in such a shallow bark, it might embark all its capital. This conclusion is reached by misapplying the maxim that the greater includes the lesser. (Record, page 106, lines 31-3.) The maxim is *purely* a *quantitive* one for the measuring of things *possessing* all the *same qualities.*

The court's error lay in confusing the method of acquiring title (purchase) with the quality of the estate, which might be acquired by such method.

The power to "purchase" is not a "greater" or general power.

On the contrary, for the following reasons, it is a specific power, to be strictly construed.

1. The statute power to purchase is a common law authority, analogous to a power of attorney. (1 Sugd. on Pow., section 1, paragraphs 1-2.)

A *special* power *differs from* a *general* one, in that it gives authority to do *only a particular act, instead* of *repeated* acts of a certain character. (Story on Agency, 9th Ed., section 17; Ewell's Evans Agency, *101-2.)

The only general powers conferred by the national bank act, calling for repeated acts day by day, are the general substantive banking powers, such as receiving deposits, making loans, issuing drafts or circulating notes, etc.

On the contrary, this *power to purchase* is *not* a *general* substantive banking power. It is not intended to be repeatedly exercised, day by day. It is not expected the bank will be buying and selling realty for banking business sites day by day.

This *power to purchase* is *a special* power, intended to be exercised only once; or, at least, at infrequent intervals, only so often as business prudence may require a change of location in the banking house.

Such special powers and corporate charter powers are both alike to be strictly construed against the donee and the corporation.

> "General words are to be construed in reference to the particular terms which form the subject-matter of the instrument, in furtherance of, but in subordination to, the general power conferred." (Geiger vs. Bolles, 1 Thomp. and C., 129; Washburn vs. Alden, 5 Cal., 463; Billings vs. Morrow, 7 Cal., 171; s. c., 68 Am. Dec., 235; Rountree vs. Denson, 59 Wis., 522; s. c., 18 N. W., 518.)

This power is, therefore, a special and not a general one. It must be strictly construed, in furtherance of, but in subordination to, the conduct of the general banking business, according to the prohibitions of the bank act.

The following case illustrates the strictness with which the Federal Supreme Court views a five (5) year lease made by a national bank:

> "By section 5136 of the Revised Statutes, a contract of lease, at a large rent, of an office to be occupied 'as a banking office, and for no other purpose,' for the term of five years, determinable at the end of any year by either party, executed by a national bank as a lease, after having duly filed its article of association and organization certificate with the comptroller of the currency, but not having been authorized by him to commence the business of banking, is void, and can not be made good by estoppel, and will not support an action against the bank to recover anything beyond the value of what it has actually received and enjoyed."
>
> McCormick vs. Market Bank, 165 U. S. Rep., 538, 539.

2. Moreover, the power to purchase is in terms expressly and specifically subordinate, subsidiary and incidental to the general substantive banking powers. It reads:

> "A national banking association may purchase, etc., real estate for the following *purposes*, and for *no others:*
>
> "First. Such as shall be *necessary* for its immediate accommodation *in the transaction of its business*, etc." (U. S. Rev. St., section 3157.)

This language—"for its immediate accommodation in the transaction of its business"—shows that the power to purchase is a subordinate, subsidiary, incidental power. It is intended only to aid and promote the business of the bank, by furnishing it with "immediate accommodation in the transaction of its business."

The national bank act does not contain any language authorizing a bank to unite and commingle the conduct of the banking business with the conduct of a real estate and rental business. This is expressly prohibited by the language of section 5737, which says :

> "A national banking association may purchase, etc., real estate for the following *purposes*, and for *no others*."

The "purchase" power to obtain a banking office must have a meaning consistent with the purpose of the act.

Of two meanings, that which more accords with the act must be preferred.

The transaction with Schleier was wholly inconsistent with the continuing solvency of the Bank.

Technically, "purchase" is one of the two methods of acquiring land titles. (Kent Com., 12th Ed., 373.)

It includes every lawful method of coming to an estate by act of the party, as opposed to the act of the law. (Burt vs. Merchants' Ins. Co., 106 Mass., 356, 364; Anderson's Dicty., 846, Title, "Purchase.")

This court has settled the statutory sense of "purchase" to be its ordinary untechnical meaning.

"But generally, in statutes as in common use, the word is employed in a sense not technical, only as meaning *acquisition by contract* between the parties, without governmental interference."

Kohl vs. U. S., 91 U. S., 367, 374.

"The word 'purchase' is to be taken to mean an acquisition of land for a valuable consideration."

Farrington vs. Wilson, 29 Wis., 383.

McCartee vs. Orphan Asy. Soc., 9 Cowen, 437, 504, 506-8.

Hoyt vs. Van Alstyne, 15 Barb., 572.

19 Amer. and Eng. Ency. Law, 571.

4 Kent's Com. (12th Ed.), *441.

Grant vs. Bennett, 96 Ill., 535.

Anderson's Dicty., 846, Title, "Purchase."

Clearly the bank's power to "purchase" was intended to empower it to acquire a fee simple title to its banking house.

If the technical sense of "purchase" be applied, the result is even more in accord with the definite purpose of the bank act—the solvency of the bank. For, technically, an heir, who is a devisee of an estate is said to take title, not in his status as heir, but by a "purchase." For, thereby he has a better title, free from incumbrances and charges which, as heir, he would be bound to take title subject to.

At common law the charter of a bank of discount and deposit does not confer unrestricted power to buy

and sell realty, because it is inconsistent with the end and purpose of banking institutions. (Thweat vs. Bank of Hopkinsville, 81 Ky., 15-6; Bank of Mich. vs. Nils, Walker's Chan., 100; Bank of Niles vs. Mich., 1 Doug. (Mich.), 401.

Power expressly granted to acquire realty for business purposes, or as security for indebtedness, is strictly construed. (Russell vs. Topping et al., 21 Fed. Cas., 60, No. 12, 163 (5 McLean, 194); Chautauqua County Bank vs. Risley, 4 Denio, 480, 487-8.)

Since, therefore, by the acquiring of a fee simple title, the only burden will be the payment of such taxes and assessments as are in each community imposed upon other property owners in fee, and the Bank will have what will in truth be an asset, which, if necessary, can be mortgaged or sold, and the Bank's solvency more nearly preserved than it can under a transaction like that of this Bank with Schleier, it is clear that this lease was not within the Bank's charter contract to "purchase."

The prohibitions limiting the power to "purchase" to

1. **"Such as shall be necessary,"**
2. **"For its immediate accommodation,"**
3. **"In the transaction of its business,"**

indelibly stamp the transaction between Schleier and the Bank as absolutely void as beyond the power of the Bank.

We have shown that the affirmative grants of charter powers to the Bank are pregnant with co-equal and correlative implied prohibitions, commencing with the limits of such affirmative grants, and having the same power as if express.

The ordinary meaning of the foregoing limits to the "purchase" power of the Bank absolutely voids the transaction with Schleier.

They serve to emphasize the purpose of Congress to keep the national bank solvent by keeping the assets in currency, and out of real estate. The language is:

> "Such (real estate) as shall be *necessary* for its (the bank's) *immediate accommodation* in the transaction of its business."

"Accommodation" means, "adjustment, adaptation, convenience." (Standard Dict., page 16.)

"Accommodate" signifies to make commodious. (Crabb's Eng. Syn., page 429.)

But the word "accommodation" is limited by the word "immediate."

The word "immediate" means, "separated by no appreciable space; very near; close; acting or acted upon, without the intervention of anything between cause and object." (Standard Dict., page 897.)

Therefore, the phrase, "immediate accommodation," used, as it is in the national banking act, concerning the bank and its business quarters,

(1) In respect to the element of *time*, that is, the *life of* the corporation;

(2) In respect to the element of *value*, that is, the *amount* of the bank's *assets invested* therein; and,

(3) In respect to the element of *space*, or the area thereof,

Was by Congress intended to be such as to expressly declare that there should not be any substantial disparity between the bank's business require-

ments and its place of business, in any of these elements.

The corporate body of the bank should be suitably habilitated during its life, much the same as the body of a living person should be clothed with a reasonably well-fitting "business" suit of clothes. There should be neither extravagance in expense or value, nor disparity in size. It should be suited to the business life of the owner.

The "immediate accommodation" is *a maximum* limitation, beyond which the bank may not go.

But the phrase, "immediate accommodation" is further qualified, restrained and modified by the word "necessary."

That word is defined as:

> "*Being such in its nature,* conditions or *relations,* that it *must exist,* occur, etc.
>
> "Indispensably requisite or absolutely needed to accomplish a desired result; essential; requisite.
>
> "Resulting from external or physical causes."
>
> Standard Dict., page 1182.

The word "*necessary,*" then, also speaks to the some relation between the needs of the bank as a corporate body, and the quarters comprising its place of business. It refers to what must be, and may therefore be said to be, *a minimum limitation,* less than which the bank may not do, for by statute it must have a place of business.

And when the word "*necessary,*" as *a minimum* limitation, is considered in connection with the words "*immediate accommodation,*" as *a maximum* limitation, the phrase, which altogether reads, "*Necessary*

for its immediate accommodation in the transaction of its business," clearly means that the business place of a national bank must be suitable to the accommodation thereof, and that any disparity between the bank and its quarters, either in the elements of space or area, or amount of value concerned, and the length of its corporate life (twenty years), is not to be tolerated or warranted under the law.

According, therefore, to the plain, obvious, ordinary meaning of the language, it is clear that a lease of a place of business for ninety-nine years, for a Bank whose existence is only twenty years, of a building of eight stories, when only one-half of one story was actually used by the Bank for its banking place, into which is embarked over $305,000, when its share capital was only $300,000, is absolutely beyond the power of the Bank, and void.

Not only is this so, but the very result which has occurred to this Bank, is the very thing which it was the aim, intent and purpose of the act of Congress to prevent.

The National Bank, by consuming more than the amount of its capital in the construction of an eight-story building, under the lease in question, for ninety-nine years, so embarrassed and hampered itself that it became insolvent.

It must be clear to any one that if this money had not been embarked in this real estate transaction, this Bank might still be a going institution at the present time. For, undoubtedly, the sum of $300,000 would have tided it over the panic, and saved not only the destruction of itself, but loss and damage to its depositors and creditors.

For these reasons, therefore, because the contract of lease is opposed not only to the specific intent of the specific provisions of the national bank act in relation to the purchase of real estate and the having of a business place, but also opposed to the general intent of the act, it is clear that the transaction of Mr. Schleier and the defendant National Bank concerning its $305,000.00 capital, was illegal and unauthorized, and beyond the power of the Bank to make.

The legitimate consequences of the transaction between Schleier and the Bank, whereunder its $305,000 in capital and money was put into the Bank building, was

(1) A debarking of its capital, theretofore pledged by charter contract to be kept in currency and used in conducting the business of a solvent National Bank, out of such banking business and into the real estate business.

(2) *It was an abandonment and disabling* of the National Bank from performing its public service for an attempted private gain of its shareholders, involving a private loss to the Savings Bank and its depositors.

(3) *It was a violation* of section 5204, prohibiting the withdrawal of its capital.

(4) *It was a violation* of section 5202, prohibiting the Bank from becoming "indebted or any way liable" to an amount in excess of its $300,000 share capital.

It stood the chance of losing the $305,000 capital —the building. For by the Bank's covenants the building was not to be removed, and was, at the end of the ninety-nine-year term, to go to Schleier or his assigns.

(5) *It was a violation* of section 5137, whereby the Bank was prohibited from taking out of its capital, and holding in real estate, any more than "such as was necessary for its immediate accommodation in the transaction of its business." The Bank had only been in business one month and eleven days, when, on September 12, 1889, it made its covenants in this lease.

It was only a year and five months old, January, 1891, when it had put its $305,000 into the building and moved into it.

The effect of the whole transaction was to commit a flagrant breach of the charter contract between the National Bank and the Savings Bank and its depositors, by disabling the former from being able, as a solvent National Bank, to repay the latter. It was, therefore, void.

> "A corporation can not disable itself by contract from performing the public duties which it has undertaken, and, by agreement, compel itself to make public accommodation or convenience subservient to its private interests." Gibbs vs. Baltimore Gas Co., 130 U. S., 410.
>
> Woodstock Iron Co. vs. Extension Co., 129 U. S., 644, 660-661.

The National Bank, being in possession of its $305,000 capital—the building—down until after the suit of the Savings Bank was commenced, and being insolvent, as well as in the course of liquidation, and having agreed in such suit that it would not dispose of the building, this appellant receiver, as their representative, was and is entitled to follow and recover

such $305,000 capital and moneys to pay their $475,825.71 judgment, rendered in such suit.

He has the status and right of the Savings Bank and its depositors, who were creditor depositors before and when these unlawful transactions between the Bank and Schleier occurred.

Schleier was a purchaser with *guilty* knowledge, and by his threats introduced the further illegal element of exchanging one asset—the building—for another asset, the stockholders' liability—thus at one stroke wiping out substantially *all* the Bank's assets.

(4) The transaction of October 30, 1897, between Schleier and the Bank, in view of the Bank's insolvency and liquidation, was a transfer prohibited by the act prohibiting preferences.

> "Section 5242. * * * All transfers of the notes, bonds, bills of exchange or other evidence of debt owing to any national banking association, or of deposits to its credit, all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion or other valuable thing for its use, or for the use of any of its shareholders or creditors, and all payments of money to either, *made after the commission* of an act of insolvency, *or in contemplation* thereof, made *with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another*, except in payment of its circulating notes, *shall be utterly null and void.*"
>
> U. S. Rev. St., section 5242.
>
> Ball on Natl. Banks, ...
>
> Bolles, Natl. Bank Act, 191, section 409.
>
> Pratt's Digest, 1900, 138.

Under that part of the argument showing Schleier was not an innocent purchaser (ante, pages 21, 25-8), the decisions are cited construing this section.

We insist that the Bank's covenants that the building, its $305,000 capital, should not be removed, but eventually be surrendered to Schleier, was an act attempting to give Schleier a preference, in case of or in contemplation of insolvency, denounced by section 5242. Schleier's title was executory, because of the Bank's possession during its insolvency, caused by the erection of the building. He received full payment of his rent during all the years of the Bank's insolvency, up until the three last months prior to October 30, 1897. The charter contract was an inseparable part of the Bank's deal with Schleier, including the above section. Any contract for a preference was and is void.

The following case illustrates the principle:

> "A power to trustees of a public turnpike act, which authorized them to mortgage the tolls, but declared that there should be *no priority among* the creditors, *does not authorize a mortgage* of the toll-houses or turnpike gates, because if any creditor had a power, to enter and take possession of the toll-gates, he would gain a priority which the act has denied."
>
> 1 Sugden on Powers, 555 (*517).
>
> Fairtitle vs. Gilbert, 2 Term. Rep., 69.

We insist that if every transaction by the Bank and Schleier down to October 30, 1897, was valid, yet the bill stated a case for equitable relief.

Schleier's full knowledge of the agreement of the Bank, in the pending suit, not to dispose of the same;

The insolvent condition of the Bank;

The Bank's being in voluntary liquidation;

The misrepresentation that the income of the Bank building was less than the fixed charges, so that it was a losing, when, in fact, it was a gaining venture (the Bank had paid the rent ever since 1893, over four years, and no one had suggested that it was losing, until three months before its transfer to Schleier, when the million-dollar suit of the Savings Bank was nearing judgment).

The threats of Schleier to hold the Bank and its stockholders liable upon the personal covenant to pay rent for the remaining 91 years of the lease, and,

Their too ready acceptance of the proposition, and consequent liquidation of their stockholders' liability, itself an asset of the Bank, for the creditors' benefit; and,

The gross inadequacy of deeding a $305,000 building, which was not a losing investment, to satisfy a demand less than $6,000—

Certainly presents a case which ought to appeal most strongly to a court of equity, for relief.

A court of chancery ought to be able to find some way to restore to the 5,000 small Savings Bank's depositors—the tradesmen, mechanics, laborers, servants, shop girls, minors and others—who have worked early and late, suffered privations to lay by a few dollars for a rainy day, who have thus found their all swallowed up in a most inequitable and unconscionable transaction, to the preference of what, at best, is a *malum in se* claim of a single creditor, and the pro-

tection of the stockholders of the Bank, while they are left to hold a fruitless judgment.

The amounts of the claims of the Savings Bank's depositors was an honest debt, incurred under honest circumstances, for which they do not seek anything more than just payment in full. They do not seek to have more than due.

That is a great deal more than can be said for Schleier, in his seeking to hold a $305,000 building for less than a $6,000 debt.

> "As between the creditors of a bank, those whose debts were created under the lawful power given by the charter must be preferred to those who claim under a contract that the bank, under its charter, has no power to make."
>
> Bank of Chattanooga vs. Bank of Memphis, 9. Heisk., 408.
>
> Taylor on Corp., section 272.
>
> Marshall vs. Grand Gulf R. R. and Bank Co., 12 Rob., 198.
>
> Fox vs. Seal, 22 Wallace, 484.
>
> Davis vs. Flagstaff Silver Min. Co., 2 Utah, 74.
>
> St. L. Drug Co. vs. Robinson, 81 Mo., 18.
>
> Abbott vs. Baltimore, etc., St. P. Co., 1 Md. Ch., 542.
>
> Natl. Bank vs. Keefer, 95 Ky., 97; s. c., 23 S. W., 675.

We respectfully submit that there is equity in the bill to which the demurrer was sustained, as well as in the amended bill tendered for filing. That this

appellant receiver representing those who were creditors during and prior to the time of the wrongful expenditures, and while the title to the building was executory, and in the possession of the Bank, was entitled to sue as well as the government.

That for these reasons the judgment should be reversed, which is accordingly respectfully prayed.

IX.

THE AMENDED BILL OF COMPLAINT SHOULD HAVE BEEN ALLOWED TO BE FILED.

When, at the circuit, the demurrer was sustained to the "complaint as amended" for want of equity in the bill, because no one but the United States could make the objction (Record, page 96, folios 145-6), it was thought the matter might be made to appear more clearly to the trial court if the debtor and creditor relation between the two Banks was carried back from July, 1893, when both banks first failed, to the first of August, 1889, prior to the making of the lease, when the National Bank first commenced business.

Also, if the sworn statements made five times each year expressly showing the building to be an asset of the Bank of over $300,000 value should be expressly pleaded—they being referred to in appellee Schleier's demurrer to the bill as being insufficient because,

> "nowhere denying that such lease and building were mentioned as resources five times each year in the published statements required of the said National Bank by the United States national

bank act." (Schleier's Demurrer, Record, page 31, folio 44.)

the case might appear more clear in its inequities.

But both the Circuit and appellate courts have held that there is no equity in the bill, for the reason that only the United States can raise the question presented, and, consequently, that then existing creditors, The People's Savings Bank and its then depositors, can not. Therefore, that ruling practically eliminates the question of the "amended bill of complaint."

However, if either of the above facts become material to this court in considering this case, the pleading tendered for filing is in the record, and we must be understood as claiming the right to have it filed, if it would have obviated the objection, of want of equity in the bill.

X.

IF ONLY THE GOVERNMENT CAN RAISE THE OBJECTIONS TO THE NATIONAL BANK'S UNLAWFUL ACTS,

THEN IT IS DOING SO THRO ITS ALTER EGO, THE COMPTROLLER, UNDER WHOSE EXPRESS DIRECTION THIS SUIT IS BROUGHT.

THE COMPTROLLER, AND HIS APPOINTEE, THE RECEIVER,

ARE BOTH PUBLIC OFFICERS ENGAGED IN THE PERFORMANCE OF THE SOVEREIGN DUTY OF DOING JUSTICE BETWEEN THE INSOLVENT NATIONAL BANK AND ITS CREDITORS

BY ADMINISTERING THE ESTATE OF THE INSOLVENT NATIONAL BANK,

UPON THE EXPRESS STATUTORY ORDER OF THE UNITED STATES,

THE NATIONAL BANK ACT.

> "The United States is a government, and, consequently, a body politic and corporate."
>
> United States vs. Morris, 2 Brock., 96; s. c., 26 Fed. Cas., 1211, 1216.
>
> 5 Thompson's Com. on Corp., section 5785.

It, therefore, (1) possesses and enjoys property,—for its *governmental* purposes,—(2) may and does deal with its citizens in much the same way as they deal with each other, i. e., in a *private proprietary* contractual capacity.

Therefore, the United States as a corporate body in dealing with its citizens, whether natural, or artificial personages, sustains two classes of relations, which may be said to represent its two classes of substantial rights, viz.:

First—Public, governmental or sovereign; and,

Second—Proprietary, or, in a sense, private contractual, as contra-distinguished from the first class of substantive rights.

U. S. vs. U. Pac. R. R. Co., 98 U. S., 569, 613.

Sinking Fund Cases, 99 U. S., 700, 724.

The United States, as a public corporation, therefore possesses and exercises two distinct classes of powers, viz.:

1. Those sovereign and legislative governmental, collective public rights possessed by every governing corporation of our form of government, and,
2. Those of contract, that are more nearly akin to private proprietary rights.

The chartering of national banks by the grant of their corporate franchises is clearly a sovereign legislative act, comprising a *power of the* first class (U. S. vs. U. Pac. R. R. Co., *supra;* Bank vs. Dandridge, 12 Wheat., 64, 68; Bank vs. Earl, 13 Pet., 579).

The United States may become a depositor of its funds in a national bank. It is then dealing with the bank in much the same relation as any private individual depositor. It is held not to be entitled to the preference ordinarily given by writers to the sovereign in other forms of government. (Cook Co. Nat'l Bank vs. U. S., 107 U. S., 445, 448.)

Being a depositor is clearly an act, power and right of the second class.

In this case the United States was in no way interested as a depositor, or otherwise, under any rights, powers or acts of the second class.

The only other relation, therefore, which the United States bear to this or any National Bank, under the national bank act, is that of *a government* exercising its *sovereign*, legislative and executive governmental control over a corporation, which it has created, but has *no proprietary interest in*, for the *administration and distribution of the assets* of such insolvent Bank, by the acts of the public officers of the executive department of the government of the United States.

This suit is brought and prosecuted by the appellant receiver, under the express direction and order of the comptroller of the United States.

The comptroller is, so to speak, the *alter ego* of the United States. In the creation of banks, he may withhold his certificate to commence business (section 5169).

Their continuance in business, and their dissolution, is by law wholly placed in his hands.

He is "expressly charged with the execution of *all laws* passed by Congress, relating to the national currency" and the banks. (Section 324.)

The receiver is appointed by, and always remains, "under the direction of the comptroller" (section 5234).

Both the comptroller and his receivers are agents and *public* officials of the United States, who sue in the Federal Courts without regard to their citizenship or the amount involved. (Kennedy vs. Gibson, 8 Wall.,

498; In re Chatwood, 165 U. S., 443; Sonnentheil vs. Christian Morlen Brewing Co., 172 U. S., 401; Auten vs. U. S. Natl. Bank, 174 U. S., 125, 141; Price, Rec., vs. Abbott, 17 Fed., 506; Stephens vs. Bernays, 41 Fed., 401.)

The comptroller and his receiver occupy public stations, or employment, under the United States. (U. S. vs. Hartwell, 6 Wall., 385; Hall vs. Wisconsin, 103 U. S., 5, 8.) In them, as such public officers and agents of the United States, is vested a portion of the sovereignty of the United States, in enforcing the municipal regulations affecting the general interests of the people in their dealings with the national banks. (Hall vs. Wisconsin, 103 U. S., 5, 9.)

National banks are *quasi* public corporations, created for the performance, as instrumentalities of government, of the important public service of furnishing currency to promote trade and commerce between its citizens. This they are to do by conducting the business of banks of discount, deposit and circulation, as provided by the national bank act. (Ante, pages 57-65.)

In the United States, a republic, its highest and most sacred sovereign duty is the administration of justice between its citizens, so as to preserve that equality of right between them, which is the test of its citizenship.

> "A state is a body of free persons, united together *for the common benefit*, to enjoy peaceably what is their own, and to DO JUSTICE *to others*." (Chisholm vs. Georgia, 2 Dall., 456.)

This includes the furnishing of (1) the *tribunal*, (2) the *remedy*, and (3) the speedy *administration*

of the remedy. These comprise that most sublime act of sovereign power—the administration of justice between its citizens.

The national bank act contains all three of these elements.

The *tribunal* is of the executive branch of the government, that particular bureau presided over by the comptroller of the currency, aided by his subordinates, the bank examiners and bank receivers.

The *remedy* is the constant supervision exercised by the government over the exercise of the franchise—the conduct of the banking business. The bank must report its condition at least five times each year (section 5211) in the form required by the comptroller (section 5211). The bank examiners are, also, from time to time, continually making repeated and unannounced examinations of the banks' books, assets and affairs and reporting thereon to the comptroller.

These frequent examinations and reports, together with numerous statutory safeguards, are intended to keep the banks solvent, going institutions. But, if they fail, the act provides the whole remedy.

> "The national bank act contemplates the *statutory mode* of *dissolving, winding up and settling the affairs* of a national bank *by the comptroller* of the currency, *through the appointment of a receiver;* nevertheless, the exercise of this statutory power is not the exclusive or only remedy which a creditor may invoke. A creditor of a national bank has his election to proceed either under the national bank act or by the exercise of the ordinary powers by the appoint-

ment of a receiver in an equitable action in a court of equity."

Wright vs. Merchants' Natl. Bank, 1 Flip. C. Ct., 568; s. c., 30 Fed. Cas., 679, case No. 18,084.

Irons vs. Mfg. Natl. Bank, 6 Biss, 301; s. c., 13 Fed. Cas., 100; also, 120 U. S., 27.

The history of the times when national banks were created supplies the reason for these provisions.

At the opening of the civil war, in 1861, there were 1,600 state banks, organized under laws of thirty-four different states, having a circulation of $202,000,000 of uncertain value, through bad management, of which about $50,000,000 was in the rebel states. The federal treasury was empty, and its expenses were rapidly nearing a million a day. For the year ending June 30, 1861, the government revenues were only $41,000,000.00, the expenses $62,000,000.00, and the estimated expenses under President Lincoln's call for 400,000 troops was $318,000,000.00. (History for Ready Reference, etc., Larned, volume 3, page 2219.)

Strict and *vigilant* indeed must be *the supervision* over the business and affairs, and *forceful, speedy* and *equitable* must be *the remedy* for securing and administering the assets of insolvent banks, in order to restore the business confidence of the people, well nigh exhausted in their dealing with the unstable and worthless wild cat banks and currency of the state banks, so as to raise means to save the nation.

Indeed, this unceasing and high degree of watchfulness in sovereign visitorial power is almost equiv-

alent to the bank's being at all times in the legal custody and possession of the United States.

In actual practice, the step from governmental supervision to actual legal custody and possession is so slight, that it frequently occurs, by the bank examiner, on discovering an unfavorable condition, being converted at once into a custodian, and then himself or another, by the comptroller's order, in executing the law, taking possession as receiver.

In a private action there must exist the elements of, (1) the private substantive right of the citizen, (2) the appropriate remedy, provided by law, which the citizen is at liberty to invoke, and (3) the appropriate tribunal authorized by law to administer the remedy invoked.

The national bank act combines these three elements into the statutory remedy of which the receiver is a part.

The comptroller and his subordinate, the receiver, comprise not only element (2) of a private action—the appropriate remedy provided by law—but also element (3), the appropriate tribunal empowered to administer the remedy. The bank act goes even further. In order to restore the public confidence, so greatly shaken by its sad experience with long, tedious, expensive and often fruitless equity suits to uncover and recover lost and wasted assets of state banks, the United States has assumed, as a party to and a part of the charter contract, the duty not only of providing, but also *upon its own motion, of enforcing, through its own executive public officers*, the *tribunal* and *the remedy*.

Congress makes it the duty of the United States district attorney, under the provisions of section 380,

Pratt's Digest, page 163, paragraph 153, to represent the United States and its officers and agents in all proceedings under the national bank act.

Mark you, this is done *on the government's own motion*, and not by private creditors, in a private action in equity.

The government of the United States, as the sovereign governmental grantor of every national bank's charter-contract, has pledged itself to all those who deal with national banks, as the possessor of sovereign powers of administering justice intended to be exercised for the benefit of its citizens, to execute the statutory remedy of the act and speedily administer upon the assets of an insolvent national bank, for the purpose of securing an equal and ratable distribution of its assets among all its unsecured creditors, giving the United States only a limited priority.

Case vs. Terrell (11 Wall., 199) has no application. Representation to *enforce* the law *against* others is a very different function from representation for *subjecting* the *principle to* a *pecuniary liability*.

It is not claimed that the receiver is here representing the United States in any proprietary contract, creditor sense, so that a judgment could be entered against it as a creditor of the insolvent Bank, as was attempted and denied in the correctly decided case of *Case vs. Terrell*, 11 Wall., 199. The sovereign can never be sued without its consent.

The act of the agent is the act of the principal. The appellant receiver is the ultimate agent of the United States, in performing its pledge to its citizens, to secure their rights out of this insolvent bank.

Therefore, if no one but the government may protect the rights of these creditors, then, we say, for the foregoing reasons, the government is, in legal effect, doing so here, in prosecuting this suit under the express direction of the comptroller.

For all the foregoing reasons it is submitted there was equity in the bill, and the demurrer should have been overruled, instead of sustained.

The amended bill should have been allowed to be filed.

Very respectfully submitted,

HARPER M. ORAHOOD,
JAMES H. BROWN,
Solicitors for Appellant.

FEDERAL STATUTES CONCERNING NATIONAL BANKS.

"THE NATIONAL BANK ACT."

"Be it enacted, etc., (1) that the *act* entitled, 'An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof,' approved June third, eighteen hundred and sixty-four, *shall hereafter be known as 'The National Bank Act.'*"

Supplmt. to R. S. of U. S., Vol. 1 (2d Ed.), 1874-91, 27.

Ball on Natl. Banks, 46.

Bolles, Natl. Banking Act, —.

Pratt's Digest, 1900, 165.

ORGANIZATION CERTIFICATE.

"Sec. 5134. The persons uniting to form such an association shall, under their hands, make an organization certificate, which shall specifically state:

First. The name assumed by such association; which name shall be subject to the approval of the comptroller of the currency.

Second. The place where its operations of discount and deposits are to be carried on, designating the state, territory, or district, and the particular county and city, town or village.

Third. The amount of capital stock and the number of shares into which the same is to be divided.

Fourth. The names and places of residence of the shareholders and the number of shares held by each of them.

Fifth. The fact that the certificate is made to enable such persons to avail themselves of the advantage of this title."

U. S. Rev. St., section 5134.

Ball on Natl. Banks, 47.

Bolles, Natl. Banking Act, 6, section 14.

Pratt's Digest, 1900, 5.

CORPORATE POWERS OF ASSOCIATIONS.

Sec. 5136. Upon duly making and filing articles of association and an organization certificate, the association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—

(PRIMARY, SUBSTANTIVE BANKING POWERS.)

(SECONDARY, SUBORDINATE, INCIDENTAL POWERS.)

First. To adopt and use a corporate seal.

Second. To have succession for the period of twenty years from its organization, unless it is sooner dissolved according to the provisions of its articles of association, or by the act of its shareholders owning two-thirds of its stock, or unless its franchise becomes forfeited by some violation of law.

Third. To make contracts.

Fourth. To sue and be sued, complain and defend,

(PRIMARY, SUBSTANTIVE BANKING POWERS.)	(SECONDARY, SUBORDINATE, INCIDENTAL POWERS.)
	in any court of law and [or] equity, as fully as natural persons.
	Fifth. To elect or appoint directors, and by its board of directors to appoint a president, vice-president cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places.
	Sixth. To prescribe, by its board of directors, by-laws not inconsistent with law, regulating the manner in which its stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its general business conducted, and the privileges granted to it by law exercised and enjoyed.
Seventh.....	To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary
to carry on the business of banking,	
(1) By discounting and negotiating promissory	

(PRIMARY, SUBSTANTIVE BANKING POWERS.)

notes, drafts, bills of exchange, and other evidences of debt;

(2) By receiving deposits;

(3) By buying and selling exchange, coin, and bullion;

(4) By loaning money on personal security;

(5) By obtaining, issuing, and circulating notes according to the provisions of this title.

(SECONDARY, SUBORDINATE, INCIDENTAL POWERS.)

"But no association shall transact any business except such as is incidental and necessarily preliminary to its organization until it has been authorized by the comptroller of the currency to commence the business of banking."

U. S. Rev. St., section 5136.

Ball on Natl. Banks, 49.

Bolles, Natl. Banking Act, 23, section 49.

Pratt's Digest, 1900, 6.

PLACE OF BUSINESS AND BANKING HOUSE.

"Sec. 5190. The usual *business* of each national banking association shall be *transacted at an office or banking house* located in the place specified in its organization certificate."

U. S. Rev. St., section 5190.

Ball on Natl. Banks, 189.

Bolles, National Bank Act, 17, section 40.

Pratt's Digest, 1900, 79.

APPOINTMENT OF OCCASIONAL EXAMINERS.

"Sec. 5240. The comptroller of the currency, with the approval of the secretary of the treasury, shall, as often as shall be deemed necessary and proper, appoint a suitable person or persons to make an examination of the affairs of every banking association, who shall have power to make a thorough examination into all the affairs of the association, and, in doing so, to examine any of the officers and agents thereof on oath; and shall make a full and detailed report of the condition of the association to the comptroller."

U. S. Statutes, section 5240.

Ball on Nat'l. Banks, 239, 239.

U. S. Compiled Statutes, 1901, volume 3, page 3516.

REPORTS TO COMPTROLLER OF THE CURRENCY.

"Sec. 5211. Every association shall make to the comptroller of the currency not less than five reports during each year, according to the form which may be prescribed by him, verified by oath or affirmation of the president or cashier of such association, attested by the signature of at least three of the directors. Each such report shall exhibit, in detail and under appropriate heads, the resources and liabilities of the associations (association) at the close of business on any past day by him specified; and shall be transmitted to the comptroller within five days after the receipt of a request or requisition therefor from him, and in the same form in which it is made to the comptroller shall be published in a newspaper pub-

lished in the place where such association is established, or if there is no newspaper in the place, then in the one published nearest thereto in the same county, at the expense of the association; and such proof of publication shall be furnished as may be required by the comptroller. The comptroller shall also have power to call for special reports from any particular association whenever in his judgment the same are necessary in order to a full and complete knowledge of its condition."

U. S. Statutes, section 5211.

Ball on Nat'l. Banks, 211.

U. S. Compiled Statutes, 1901, volume 3, page 3498.

LIMITATIONS UPON CONTRACT POWER OF BANK.

(1ST) AS TO ACQUIRING REAL ESTATE FOR BANKING HOUSE, ETC.

"Sec. 5137. A national banking association may *purchase, hold* and *convey* real estate for the following purposes, and for *no others:*

"*First.* Such as shall be *necessary for its immediate accommodation in the transaction of its business.*

"*Second.* Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.

"*Third.* Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

"*Fourth.* Such as it shall purchase at sales under judgments, decrees or mortgages held by the association, or shall purchase to secure debts due to it.

But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years."

U. S. Rev. St., section 5137.

Ball on Natl. Banks, 141.

Bolles, Natl. Bank Act., 43, section 86.

Pratt's Digest, 1900, 19.

(2D) LIMIT OF INDEBTEDNESS TO AMOUNT OF SHARE CAPITAL.

"Sec. 5202. *No association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock* at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:

First. Notes of circulation.

Second. Moneys deposited with or collected by the association.

Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.

Fourth. Liabilities to the stockholders of the association for dividends and reserve profits."

U. S. Rev. St., section 5202.

Ball on Natl. Banks, 204.

Bolles, Natl. Bank Act, 52, section 106.

Pratt's Digest, 1900, 97-8.

(3D) LIMITATION BY PROHIBITION AS TO WITHDRAWAL OF CAPITAL.

"Sec. 5204. *No association,* or any member thereof, *shall,* during the time it shall continue its banking operations, *withdraw, or permit to be withdrawn,* either in the form of dividends or otherwise, *any portion of its capital,* etc."

U. S. Rev. St., section 5204.
Ball on Natl. Banks, 204.
Bolles, Natl. Bank Act, 58, section 125.
Pratt's Digest, 1900, 98.

(4TH) AS TO CONTRACTS IN CONTEMPLATION OF INSOLVENCY, WITH A VIEW TO GIVING PREFERENCES.

"Sec. 5242. * * * All transfers of the notes, bonds, bills of exchange or other evidence of debt owing to any national banking association, or of deposits to its credit, all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, buillion or other valuable thing for its use, or for the use of any of its shareholders or creditors, and all payments of money to either, *made after the commission* of an act of insolvency, *or in contemplation* thereof, made *with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another,* except in payment of its circulating notes, *shall be utterly null and void.*"

U. S. Rev. St., section 5242.
Ball on Natl. Banks, ...

Bolles, Natl. Bank Act, 191, section 409.
Pratt's Digest, 1900, 138.

DIVIDENDS TO CREDITORS.

"Sec. 5236. From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make *a ratable dividend of the money* so paid over to him by such receiver *on all* such *claims* as may have been *proved* to his satisfaction *or adjudicated* in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held."

U. S. Rev. St., section 5236.
Ball on Natl. Banks, ...
Bolles, Natl. Bank Act, 209, section 457.
Pratt's Digest, 1900, 133.

PENALTY FOR VIOLATION OF THE NATIONAL BANK ACT.

"Sec. 5239. If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents or servants of the association to violate any of the provisions of this title, *all the rights, privileges and franchises* of the association *shall be thereby forfeited.* Such violation shall, however, be determined and adjudged by a

proper circuit, district or territorial court of the United States, in a suit brought for that purpose by the comptroller of the currency, in his own name, before the association shall be declared dissolved. *And* in cases of such violation, *every director* who participated in or assented to the same shall be held *liable in his personal and individual capacity for all damages* which the association, its shareholders, *or any other person,* shall have sustained in consequence of such violation."

U. S. Rev. St., section 5239.

Ball on Natl. Banks, ...

Bolles, Natl. Bank Act, 212, sections 464, 128.

Platt's Digest, 1900, 136.

RECEIVER FOR VIOLATION OF LAW—INSOLVENCY.

"Sec. 1. That whenever any national banking association shall be dissolved, and its rights, privileges and franchises declared forfeited, as prescribed in section fifty-two hundred and thirty-nine of the Revised Statutes of the United States, or *whenever any creditor* of any national banking association *shall have obtained a judgment against it in any court of record,* and made application, accompanied by a certificate from the clerk of the court stating that such *judgment* has been rendered and has *remained unpaid for the space of thirty days, or whenever the comptroller shall become satisfied of the insolvency* of the national banking association, he may, after due examination of its affairs, in either case, appoint a receiver, who shall proceed to close up such association, and

enforce the personal liability of the shareholders, as provided in section fifty-two hundred and thirty-four of said statutes."

Supplmt. Rev. St. U. S., Vol. 1, 74-91, 107, section 1.

Ball on Natl. Banks, 244.

Bolles, Natl. Bank Act, 212, section 465.

Pratt's Digest, 1900, 136.